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T.H. Freeland, III and
T.H. Freeland, IV

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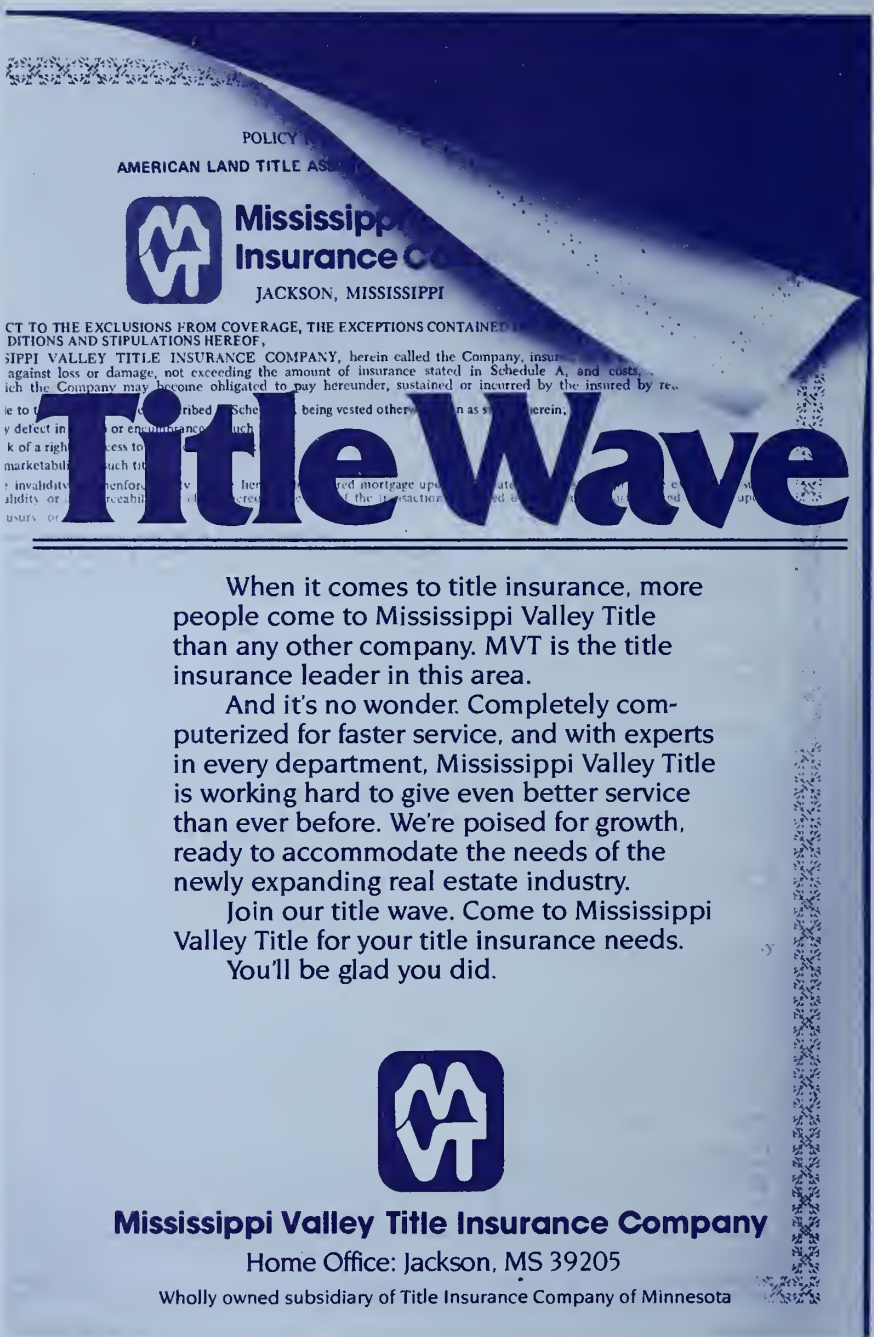
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TABLE OF CONTENTS

ARTICLE

BAD FAITH LITIGATION: A PRACTICAL ANALYSIS ..... *T.H. Freeland, III and T.H. Freeland, IV* 237

COMMENTS

MANDATORY ASSESSMENT OF DAMAGES AGAINST AN UNSUCCESSFUL APPELLANT: A CONSTITUTIONAL ANALYSIS 281

PATERNAL INHERITANCE RIGHTS OF ILLEGITIMATES UNDER MISSISSIPPI LAW: GREATER THAN EQUAL PROTECTION? 303

CONSTITUTIONAL PROBLEMS CONCERNING CERTAIN AGGRAVATING CIRCUMSTANCES USED FOR CAPITAL MURDER SENTENCING IN MISSISSIPPI 319

RECENT DECISIONS

TORTS—MEDICAL MALPRACTICE—LOCALITY RULE REQUIRES THAT PHYSICIANS BE HELD TO STANDARD OF REASONABLY COMPETENT PRACTITIONER IN MISSISSIPPI OR AN ADJACENT AREA (*King v. Murphy*, Miss. 1982) 353

CONSTITUTIONAL LAW—DUE PROCESS—IN PERSONAM JURISDICTION OVER NONRESIDENT CORPORATION IN SUIT BY A NONRESIDENT PLAINTIFF ON A FOREIGN CAUSE OF ACTION IS NOT VIOLATIVE OF DUE PROCESS IF DEFENDANT IS AMENABLE TO PROCESS WITHIN THE STATE (*Cowan v. Ford Motor Co.*, 5th Cir. 1982) 369

BOOK REVIEW

AGRICULTURAL LAW ..... *Larry S. Bush* 381

BAD FAITH LITIGATION: A PRACTICAL ANALYSIS

*T.H. Freeland, III**
*T.H. Freeland, IV***

INTRODUCTION

In *Standard Life Insurance Co. v. Veal*,[1] the Mississippi Supreme Court permitted recovery of punitive damages in a contract action because the breach of contract was willful and malicious.[2] At least since the 1944 decision of *D.L. Fair Lumber Co. v. Weems*,[3] the court has recognized that punitive damages could be recovered in contract cases when the breach was accompanied by an independent tort.[4] *Standard Life* introduced to Mississippi law the concept that a willful and malicious contract breach could be an independent tort in and of itself.[5] In the wake of this holding several major questions remain unanswered. The court has not stated an explicit rule for when the issue of punitive damages should go to the jury in such cases. The court has not clearly enumerated the elements of the tort,[6] and has expressly reserved the question whether actual damages in tort are recoverable.[7] Furthermore, the court has not given a name to the independent tort that it "found" in *Standard Life*.

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[1] 354 So. 2d 239 (Miss. 1977).

[2] *Id.* at 248.

[3] 196 Miss. 201, 16 So. 2d 770 (1944).

[4] *Id.* at 221, 16 So. 2d at 773. The independent tort in *D.L. Fair* was "the breaking down and destruction of another's fence." *Id.*

[5] *See* 354 So. 2d at 248. *See generally* Hughes, *Standard Life Insurance Company of Indiana v. Veal: A Perspective Look at Punitive Damages in Mississippi*, 1 MISS. COL. L. REV. 21, 25-26 (1978).

[6] *See infra* notes 16-24 and accompanying text.

[7] *See* Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 836 (Miss. 1979).

For better or worse, the appellation "bad faith tort" has been applied to this cause of action and appears to have been accepted[8] and, for that reason, is adopted here.

Enhancing recovery for a breach of contract solely because the breach was intentional seems contrary to the traditional rule that contracting parties have a *right* to intentionally breach and pay only contract damages.[9] Under this rule, questions regarding a breaching party's state of mind are considered irrelevant in an action for breach.[10] Economic analysis has indicated that this rule may promote "economic efficiency" by allowing a contracting party to calculate the "price" of breaching and intentionally breach when he determines that it would be more profitable to breach than to perform the obligation.[11] Early bad faith cases from other jurisdictions state that the tort is based upon a "duty to bargain in good faith."[12] This rationale seems inconsistent with the traditional rule allowing an intentional breach based on economic considerations, because it appears to apply to

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[8] *See* W. DENTON & W. WALKER, BAD FAITH LITIGATION IN MISSISSIPPI 33-34 (1981). Denton and Walker point out that the tort lacks a name and suggest the term "bad faith tort." *Id.* The term has been used in a Mississippi case once, when the supreme court refused to allow recovery for an alleged bad faith denial of a workers' compensation claim. Taylor v. U.S.F.&G. Co., 420 So. 2d 564, 565 (Miss. 1982). The chief problem with use of the term "bad faith" is that it implies a "duty to act in good faith." If a "duty to act in good faith" is equivalent to a duty not to breach intentionally, maliciously, or fraudulently, there *would* be such a duty. Under Mississippi law, however, the term "duty to act in good faith" is far broader, encompassing a much greater responsibility than that owed by ordinary contracting parties. Furthermore, the term *does not apply to every contract*. Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 390 (5th Cir. 1982); *see* Parker v. Lewis Grocery Co., 246 Miss. 873, 906, 153 So. 2d 261, 275 (1963) (whether a lease created a fiduciary duty); Risk v. Risher, 197 Miss. 155, 162, 19 So. 2d 484, 486 (1944) (same); *infra* notes 32-33, 38, and accompanying text.

[9] *See* O.W. HOLMES, THE COMMON LAW 301 (1881) (law leaves a party "free to break his contract if he chooses" and pay damages); *see also* RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, at 100 (1981) (introductory note) ("a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss").

[10] *See supra* note 9.

[11] RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, at 101-02 (1981) (reporter's note).

[12] *See* Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480 (1973). The Mississippi court has not referred to a duty to act in good faith as a rationale for the tort and has not described its decisions in terms of good faith or bad faith. Furthermore, the court would probably reject application of a "good faith" basis for the tort because of its holdings that there is not a duty of good faith in every contract. *See supra* note 8.

any contract and limit the right of a party to breach and only be subjected to traditional contract damages. Mississippi Courts have not adopted this reasoning in bad faith cases. In *Standard Life,* the Mississippi Supreme Court indicated *why* it was departing from traditional contract rules by stating that if punitive damages were not allowed, the insurance company could deny recovery with impunity.[13] The reason that an insurance company could deny a claim with impunity, but for the sanction of punitive damages, is the unequal bargaining position of an insurance company and an insured. The parties' unequal bargaining position is the logical foundation for the holding in *Standard Life.* If the underlying basis for recovery in bad faith cases is this inequality of position between the plaintiff and the defendant, recovery for bad faith should presumably be limited to those cases in which there is actually an inequality of position.[14]

To date, the bad faith tort has developed in Mississippi through insurance cases,[15] and because the question whether the

---

[13] 354 So. 2d at 248.

[14] There is no reason why recovery should be confined to insurance cases. For instance, when a manufacturer ignores a valid warranty claim by a consumer, similar inequality of position exists and the rationale of *Standard Life* should be followed to allow bad faith recovery. The rule should not be allowed, however, to extend beyond its rationale and intrude into commercial settings, such as contracts between merchants, since economic efficiency would call for a party to be able to breach such a contract and pay damages under traditional contract rules.

[15] *See, e.g.,* Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1306 (Miss. 1982) (no punitive damages as a matter of law when insurance company denied claim because of clerical error); Aitken v. State Farm. Mut. Auto. Ins. Co., 404 So. 2d 1040, 1045 (Miss. 1981) (no punitive damages as a matter of law when insurance company prevailed on the main claim); Gulf Guar. Life v. Kelley, 389 So. 2d 920, 923 (Miss. 1980) (no punitive damages as a matter of law when insurance company litigated a case of first impression); State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980) (no punitive damages as a matter of law when insurance company litigated a dispute over amount of insurance claim); Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801-02 (Miss. 1979) (no punitive damages as a matter of law when question of coverage was present); Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 835 (Miss. 1979) (punitive damage instruction appropriate when insurance company uses plaintiff's financial distress for settlement leverage); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1978) (no punitive damages as a matter of law when denial of the claim resulted from company negligence); New Hampshire Life Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978) (no punitive damages as a matter of law when policy gave the insurance company a right to a medical report and the report was not forthcoming); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977) (punitive damage instruction appropriate when basis for denial of the claim was contrary to express terms of the policy); Lincoln Nat'l

tort's principles apply to non-insurance contracts has not been addressed by Mississippi courts, a detailed discussion of the tort can only be within the context of insurance law. This article discusses the tort and its elements primarily with regard to the relationship of "insurer" and "insured."

II. The Elements of the Bad Faith Tort

As noted, neither the Mississippi Supreme Court nor federal courts, *Erie*-bound by Mississippi law, have clearly enumerated the elements of the bad faith tort. From the tort's inception, these courts have made a general statement that the tort exists when there is a failure to honor a legitimate claim with no reason to justify the denial.[16] The most refined statement of the rule was made in *Michael v. National Security Fire & Casualty*

Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977) (punitive damages instruction not justified because insurance company merely defended and lost); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 397-98 (Miss. 1975) (no punitive damages as a matter of law when insurance company litigated a dispute over the amount of the main claim); *cf.* Taylor v. U.S.F.&G. Co., 420 So. 2d 564, 565 (Miss. 1982) (principles of bad faith tort do not apply to workers' compensation claims).

For federal cases involving Mississippi bad faith and insurance law, see Henderson v. U.S.F.&G. Co., 695 F.2d 109, 113-14 (5th Cir. 1983) (*Henderson II*) (although advice of counsel would serve as a defense, it was not proved); Richards v. Allstate Ins. Co. 693 F.2d 502, 504-05 (5th Cir. 1982) (punitive damages appropriate when company denies claim under a policy provision contrary to state law); Peel v. American Fidelity Assurance Co., 680 F.2d 374, 376 (5th Cir. 1982) (no punitive damages as a matter of law when insurance company litigated factual dispute over medical testimony); Henderson v. U.S.F.&G. Co., 620 F.2d 530, 536-37 (5th Cir.) (*Henderson I*) (punitive damages appropriate when insurance company intentionally hid existence of coverage), *cert. denied,* 449 U.S. 1034 (1980); Black v. Fidelity & Guar. Ins. Underwriters, Inc., 582 F.2d 984, 990-91 (5th Cir. 1978) (reversed and remanded trial court decision for failure to determine whether arguable basis or excuse was present); Michael v. National Sec. Fire & Casualty Co., 458 F. Supp. 128, 131-32 (N.D. Miss. 1978) (no punitive damages as a matter of law when insurance company litigated a case of first impression).

One related case not involving insurance law but related in concept to the bad faith cases have also been decided. In College Life Ins. Co. of America v. Byrd, 367 So. 2d 929, 931-32 (Miss. 1979), which involved an employment contract, the court did little more than refer to *Standard Life* and state that the proof was not appropriate for punitive damages. The claim in *Byrd* differed from the claim in *Standard Life* because the former was based in part upon fraud. *Id.* at 929.

[16] Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977). Obviously, when the defendant prevails on the issue of liability, there can be no bad faith claim. Aitken v. State Farm Mut. Auto. Ins. Co., 404 So. 2d 1040, 1045 (Miss. 1981).

Co.,[17] in which the court held, "[P]unitive damages are not proper if the insurer has a legitimate or arguable reason for failing to pay a claim."[18]

The Mississippi Supreme Court has held from the beginning that the tort is one for which the defendant must "intentionally and unreasonably refuse payment of a legitimate claim."[19] The only other explanation of the tort's elements in the Mississippi cases has been through examples of facts that do or do not constitute the tort.[20]

The Alabama Supreme Court has recognized a tort essentially identical[21] to the one in *Standard Life Insurance Co. v.*

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[17] 458 F. Supp. 128 (Miss. 1978).

[18] *Id.* at 131. There has been an attempt to misconstrue "arguable reason" by placing it in the position of a defense in a bad faith case. *See* Walker, *Properly Limiting the "Arguable Reason" Defense to the Independent Tort of Bad Faith*, 8 VOIR DIRE 14, 14 (1982). Walker analyzes arguable basis or excuse as if it were a defense. Treating arguable basis or excuse as a defense is incorrect, because lack of an arguable basis is the central element of the plaintiff's proof in a bad faith case. Existence of an arguable basis is a defense only in the sense that it affords a defense to the insurance contract claim.

[19] Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977).

[20] *See infra* notes 43-103 and accompanying text. The most exhaustive list of fact examples is contained in Henderson v. U.S.F.&G. Co., 620 F.2d 530, 536-37 (5th Cir.) (*Henderson I*), *cert. denied*, 449 U.S. 1034 (1980), which states:

> Punitive damages are denied when the insurance company defends, rather than settles, a close case, *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, 186 Miss. 747, 191 So. 415 (1939); when it honestly contests the amount of damages, *Progressive Casualty Insurance Co. v. Keys*, 317 So. 2d 396 (Miss. 1975); when it contests coverage and effectively cannot recover reimbursement from the insured if it settles with the injured party and is later held not liable under the policy, *Martin v. Travelers Indemnity Co.*, 450 F.2d 542 (5th Cir. 1971); and when it contests coverage because the insured has failed to meet a policy condition, *Lincoln National Life Insurance Co. v. Crews*, 341 So. 2d 1321 (Miss. 1977). Punitive damages will not be awarded if the insurer has a legitimate or arguable reason for not paying the claim. *See Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239, 248 (Miss. 1978).
>
> Punitive damages were allowed when an insurer used its superior bargaining position to delay in paying any part of separate claims, despite the insured's dire financial straits, because of an unwritten policy to pay the whole claim at once. *Travelers Indemnity Co. v. Wetherbee*, 368 So. 2d 829 (Miss. 1979). Punitive damages were also proper when the reason for denying payment was contrary to an express term in the policy. *Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1978).

620 F.2d at 536.

[21] Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 6-8 (Ala. 1981) (insurance company liable for denying claim without a "lawful basis for refusal").

Veal,[22] by adopting Mississippi's leading expression of the requisite for liability, that "the insurer lacks a legitimate or arguable reason for failing to pay the claim."[23] Since adopting this explanation, the Alabama Court has more clearly explained the elements of the tort:

> [T]he plaintiff in a "bad faith refusal" case has the burden of proving:
>
> (a) an insurance contract between the parties and a breach thereof by the defendant;
>
> (b) an intentional refusal to pay the insured's claim;
>
> (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason.[24]

This statement of the requisites for the tort incorporates the central elements set forth in the Mississippi bad faith cases but delineates the elements of the tort more clearly than any Mississippi cases have to date. The key points are an *intentional denial* of an insurance claim when the insurance company has *actual knowledge* of the lack of an arguable basis or excuse for denial of the claim. Willfulness is a necessary prerequisite for awarding punitive damages, and the further requirement of lacking actual knowledge of an arguable basis or excuse has also been recognized by the Mississippi Supreme Court.[25]

It has been suggested that this cause of action is founded upon a fiduciary duty that exists between an insurer and an insured.[26] This suggestion is based upon a confusion of two kinds

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[22] 354 So. 2d 239 (Miss. 1977); *see supra* notes 1-2, 5, and accompanying text.

[23] Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981) (adopting the Mississippi rule set forth in Michael v. National Sec. Fire & Casualty Co., 458 F. Supp. 128, 130-31 (N.D. Miss. 1978)).

[24] National Sec. Fire & Casualty Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982).

[25] Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977).

[26] W. DENTON & W. WALKER, *supra* note 8, at 26. Reed v. Travelers Ins. Co., No. S77-0343(N) (S.D. Miss. Oct. 21, 1979), which has been cited as creating the fiduciary duty, is a case involving an insurer's bad faith failure to defend. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973), a leading California bad faith case also cited for this proposition, does not—in the majority opinion—mention the word "fiduciary" or use language indicating that such a relation exists. The dissent in *Gruenberg* states that, although a fiduciary duty exists in cases involving bad faith fail-

of insurance cases. In cases in which the insurance company has a duty to defend the insured against a third party, a fiduciary duty in defending the insured *does* exist.[27] Other than this special circumstance, there is no such duty. The Mississippi Supreme Court, in *Equitable Life Assurance Society of the United States v. Weil*,[28] held that no fiduciary duty is owed to an insured by an insurer. In *Weil*, the plaintiff was seeking to recover funds claimed due under a tontine policy[29] and argued that the insurance company, which had the fund, owed a fiduciary duty to the policy holders. The court adopted the rationale of a New York case, which held:

> [I]t cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that . . . the relation between the policy holder and the company was one of contract, measured by the terms of the policy.[30]

This view, that no fiduciary relation exists, is the proper one.

Fiduciary relations are special ones that do not exist in ordinary contract or commercial settings, such as insurance contracts.[31] A line of Mississippi contract cases dealing with fiduci-

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ure to defend, there is no such fiduciary duty in cases when an insured makes a claim against the company. 510 P.2d at 1043, 108 Cal. Rptr. at 491 (Roth., J., Pro Tem, dissenting).

[27] *E.g.*, State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co., 394 So. 2d 890, 894 (Miss. 1981). The duty to defend "is a serious duty, requiring a good faith effort to protect the insured's interest in court. There is no higher ethical duty in the legal profession than complete, absolute fidelity to the interest of the client." *Id.* at 894; *see also* 14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 51:3 (rev. 2d ed. 1982) (explaining the fiduciary nature of the agreement to defend the insured against third party claims).

[28] 103 Miss. 186, 200, 60 So. 133, 134 (1912).

[29] A tontine fund is a combination annuity/last-man bet named after an eighteenth century Neapolitan banker "by which the subscribers to a loan or common fund receive each an annuity during his life, which increases as their number is diminished by death, till the last survivor enjoys the whole income." THE OXFORD ENGLISH DICTIONARY 135 of Ta-Ti section (1933). The fund can be cast in terms of an insurance policy. BLACK'S LAW DICTIONARY 1334 (rev. 5th ed. 1979).

[30] 103 Miss. at 200, 60 So. at 134 (quoting Uhlma v. New York Life Ins. Co., 109 N.Y. 421, 17 N.E. 363, 365 (1888).

[31] Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 390 (5th Cir. 1982).

ary relations in the context of shopping center or store leases and franchise contracts has established that ordinary contracts do not give rise to fiduciary duties, and that for such a duty to arise there must be facts showing a closer relationship or heightened duty between the contracting parties.[32]

Other Mississippi cases dealing with fiduciary relations have defined the relation in terms of remedies, stating that the relationship is "one in which, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal, as would exist against the trustee on behalf of the cestui que trust."[33] Such a relationship exists when there is proof of a special influence the fiduciary has over the other because of their relation. For example, in *Wofford v. Wofford*,[34] the fiduciary relationship existed for a son managing the property of his mother. Such a condition does not exist in an insurance contract.

At least two courts in other jurisdictions have recently rejected the argument that a fiduciary relationship exists between an insurer and an insured. In a bad faith insurance case, *Bolden v. John Hancock Mutual Life Insurance Co.*,[35] a Michigan federal district court held that there could be no claim for breach of fiduciary duty arising from such a contract. The court granted partial summary judgment, dismissing any claim by the plaintiff based upon a fiduciary duty of the insurer.[36] A Georgia court of appeals in *Walsh v. Campbell*[37] similarly rejected the argument that a fiduciary relationship exists. In *Walsh*, the plaintiff had an automobile accident and filed a claim on her automobile insurance policy. She then settled with the insurance company and signed a release. Later, the plaintiff attempted to defeat the

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[32] *See* Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 390 (5th Cir. 1982) (discusses Mississippi law on fiduciary relations and contracts); Parker v. Lewis Grocer Co., 246 Miss. 873, 906, 153 So. 2d 261, 275-76 (1963) (considering whether a lease created a fiduciary duty); Risk v. Risher, 197 Miss. 155, 162, 19 So. 2d 484, 486 (1944) (same).

[33] Cresswell v. Cresswell, 164 Miss. 871, 885, 144 So. 41, 43 (1932) (quoting National Bank v. Insurance Co., 104 U.S. 54, 68 (1881)); *see* Green v. Frazier, 242 Miss. 315, 320, 135 So. 2d 399, 401 (1961); Wall v. Wall, 177 Miss. 743, 750, 171 So. 675, 677 (1937).

[34] 244 Miss. 442, 459-60, 142 So. 2d 188, 195-96 (1962).

[35] 422 F. Supp. 28 (E.D. Mich. 1976).

[36] *Id.* at 31-32.

[37] 130 Ga. App. 194, 202 S.E.2d 657 (1973).

release, arguing that she had not read it because of the fiduciary relationship existing between her and the defendant insurer. The court rejected this argument, holding that a fiduciary relationship simply does not exist. The court stated, "[It is the] general rule that the mere insured-insurer relationship will not place fiduciary responsibilities upon the insurer."[38]

The rule stated in these cases and by the Mississippi Supreme Court is the general one.[39] Rather than being grounded upon a fiduciary duty, the bad faith tort is based upon the interest in preventing an insurance company from abusing its position of strength in relation to the insured.[40] State of mind is therefore at the heart of the tort; the most important question is whether the insurance company denied a claim honestly or malicously.[41] This question is represented by the requirement that for tort liability, the insurance company must have knowingly acted without arguable basis or excuse in denying the claim.[42]

III. The Element of Arguable Basis or Excuse for Denial of a Claim

A. *An Arguable Basis or Excuse Exists When There Is a Factual or Legal Issue Concerning Liability*

The Mississippi Supreme Court has held that factual disputes over the amount of a claim afford an arguable basis for refusing to pay the claim,[43] and that an insurance company had an arguable basis to deny payment when there was a factual question whether the company had waived a policy condition.[44]

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[38] 202 S.E.2d at 661. The court rejected the plaintiff's contention that advertisements stating that it was "[l]ike a good neighbor" created a fiduciary duty. *Id.* at 662.

[39] *See* 3 G. Couch, *supra* note 27, § 23.11 (2d ed. 1960).

[40] *See supra* note 13 and accompanying text.

[41] *See supra* notes 24-25 and accompanying text.

[42] *See supra* notes 24-25 and accompanying text.

[43] Progresive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 397-98 (Miss. 1975); *see* State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980) (disallowing punitive damages when the reason for failure to pay was "a legitimate pocketbook dispute").

[44] Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977). In that

An arguable basis to deny payment also exists when there is an issue whether the plaintiff has satisfied a condition or other term of the policy.[45] The Fifth Circuit has held that when a doctor's testimony raises a factual issue of disability there is an arguable basis to deny the claim as a matter of law.[46] The Mississippi Supreme Court has further held that an insurance company has a right to defend a third party claim, rather than settle a close case, when its insured is sued for negligence.[47] The implicit rule to be drawn from these cases is that a factual dispute gives an insurance company a reason to deny a claim.

As previously noted, the Alabama Supreme Court uses the requirement of arguable basis or excuse in the same manner that it has been used in the Mississippi cases.[48] In one of the Alabama cases, *National Savings Life Insurance Co. v. Dutton*,[49] the defendant asserted that a dispute over facts essential to liability gave it, as a matter of law, an arguable basis to deny the claim. The court agreed, stating:

> In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of

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case, the policy contained a clause providing that proof of loss for claims should be submitted within a given number of days. The plaintiff alleged, but the company denied, that the clause had been waived by the company. The court held this was a dispute that gave the company legitimate reason for failing to pay the claim. *Id.*

[45] New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978). The court held that the insurance company was entitled to either a medical report or an authorization to consult the insured's physician under a policy condition. Since the plaintiff offered neither, the defendant had not been wrong in refusing to pay the claim. *Id.; see also* Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977) (allegation that plaintiff failed to meet a policy condition).

[46] Peel v. American Fidelity Assurance Co., 680 F.2d 374, 376 (5th Cir. 1982). A physician had reported to the insurance company that, in his opinion, the plaintiff was not disabled from her work as a teacher. This report provided the insurance company with an arguable basis for denying the claim. *Id.*

[47] Farmers Gin Co. v. St. Paul Mercury Indem. Co., 186 Miss. 747, 754, 191 So. 415, 416-17 (1939).

[48] *See supra* note 23 and accompanying text.

[49] 419 So. 2d 1357 (Ala. 1982).

> the denial thereof, the tort claim must fail and should not be submitted to the jury.[50]

New York's highest state court has similarly held that an insurance company has an "arguable basis" for denying a claim when there is a factual issue concerning liability.[51]

The Mississippi Supreme Court has not directly addressed this issue, but, in each bad faith case presenting a factual dispute, the court has held that the defendant had a right to litigate the particular factual question before the court.[52] The clearest principle derived from these decisions is that an insurance company has a right to litigate *any* factual issue. In the trial of a bad faith case, this means that any time the court submits the issue of liability to the jury, it has necessarily decided that there is a factual issue, and therefore that the insurance company had an arguable basis or excuse to deny coverage.

In addition to holding that various factual issues provide an arguable basis to deny a claim, the Mississippi Supreme Court has held that a previously unanswered legal question will give rise to an arguable basis.[53] Similarly, when there is a legal question whether a policy provides coverage and the policy is ambiguous, there is an arguable basis to deny a claim.[54]

The only apparent exception to this rule is when the plaintiff is able to show that an asserted factual or legal issue was a pretext rather than the genuine basis for denial. This situation occurred in *Henderson v. U.S.F.&G. Co.*,[55] which has twice ap-

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[50] *Id.* at 1362.

[51] Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 285 N.E.2d 849, 851, 334 N.Y.S.2d 601, 603 (1972). *Gordon* was an action for the alleged wrongful refusal of the company to settle a third-party claim. The refusal was based on the company's contention that the policy had been canceled. The company made the contention after first undertaking to defend the claim. The New York Court of Appeals assumed that the company was wrong as a matter of law in asserting the policy was canceled but reversed an award of punitive damages because the company had acted on the advice of counsel in taking the position that the policy had been canceled. 285 N.E.2d at 851-52, 334 N.Y.S.2d at 603-05.

[52] *See supra* notes 43-47 and accompanying text.

[53] Gulf Guar. Life Ins. Co. v. Kelley, 389 So. 2d 920, 923 (Miss. 1980); *see also* Michael v. National Sec. Fire & Casualty Co., 458 F. Supp. 128, 131-32 (N.D. Miss. 1978).

[54] Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801-02 (Miss. 1979).

[55] 620 F.2d 530, 536-37 (5th Cir.) (*Henderson I*) (affirming jury verdict and remand-

peared before the Fifth Circuit. The insurance company, after the plaintiff's demand, concealed the existence of the policy. Subsequently, the company asserted that the "denial" of the claim resulted from a "good faith" belief that a notice of cancellation had been sent.[56] The court in *Henderson II* recognized that this assertion was merely a pretext since the insurance company initially had not denied the claim and asserted a defense, but rather hid the existence of the policy. The court stated, "A belief that the policy had been cancelled was no explanation for denying that it existed."[57]

B. The Company Is Excused from Bad Faith Liability When the Denial of a Valid Claim Resulted From Company Negligence

The bad faith tort is an intentional tort requiring proof of willful, as opposed to negligent, actions.[58] Proof of no more than simple negligence by a company will not justify submission of the issue of punitive damages to the jury.[59] This requirement of willfulness led the Mississippi Supreme Court on two occasions to hold that bad faith was not present in cases involving company negligence. In *Bellefonte Insurance Co. v. Griffin*,[60] the insurance company admitted that it had negligently handled the claim. The proof showed that the denial resulted from careless, but not willful, company misconduct. The misconduct was a consequence of ongoing adjustments of the claim and a change of attorneys by the defendant. This proof was held to bar punitive damages.[61] In *Consolidated American Life Insurance Co. v. Toche*,[62] proof that the breach resulted from a clerical error not brought to the attention of the insurance company was held to

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ing for trial on punitive damage issue), *cert. denied*, 449 U.S. 1034 (1980); Henderson v. U.S.F.&G. Co., 695 F.2d 109, 111-12 (5th Cir. 1983) (*Henderson II*) (affirming punitive damage award).

[56] 620 F.2d at 537.

[57] 695 F.2d at 113.

[58] *See supra* notes 24-25 and accompanying text.

[59] *See* Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1306 (Miss. 1982); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1981).

[60] 358 So. 2d 387, 391 (Miss. 1981).

[61] *Id.*

[62] 410 So. 2d 1303 (Miss. 1982).

bar punitive damages.[63]

Although mere negligence will *not* support an award of punitive damages, recklessness in the handling of a claim may be deemed equivalent to willful misconduct.[64] For the defendant's negligence to be deemed reckless, the lack of care must amount to a positive act, rather than a simple failure to act.[65] Recklessness has been defined as conduct that discloses a conscious indifference to its consequences, without any effort to avoid them.[66] It is essentially "an intentionally done . . . unreasonable [act]."[67]

In a recent bad faith case, *Richards v. Allstate Insurance Co.*,[68] the Fifth Circuit affirmed an award of punitive damages, characterizing the conduct of the defendant as grossly negligent or reckless.[69] Although the court clearly considered the case as one of gross negligence, the description of the company's actions makes it sound like intentional conduct.[70] A provision of one of the company's policies had been held ineffective by the Mississippi Supreme Court, and, instead of deleting it, the company retained the provision and established a procedure to prevent claims from being denied under the invalid provision. The plaintiff's claim was denied despite the procedure and despite the fact that the company had been reminded by a representative of the insured that this policy provision was void.[71] The denial was perhaps negligent, but the conduct the court found to evidence bad faith, the retention of the invalid provision and the rejection of the claim with knowledge that the provision was void, seems

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[63] *Id.* at 1306.

[64] Richards v. Allstate Ins. Co., 693 F.2d 502, 505 (5th Cir. 1982).

[65] *See* 22 AM. JUR. 2D *Damages* § 252 (1965).

[66] Dame v. Estes, 233 Miss. 315, 318, 101 So. 2d 644, 645 (1958) (quoting Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 723, 50 So. 2d 578, 584 (1951); *see also* Bush v. Watkins, 224 Miss. 238, 242, 80 So. 2d 19, 21 (1955).

For a recent example of the type of callous disregard necessary to elevate negligence to a level sufficient for punitive damages, see Commodore Corp. v. Bailey, 393 So. 2d 467, 469-70, 471-72 (Miss. 1981), in which the defendant's workmen behaved offensively and ignored the plaintiff's requests for help.

[67] W. PROSSER, *The Law of Torts* § 34, at 185 (4th ed. 1971).

[68] 693 F.2d 502 (5th Cir. 1982).

[69] *Id.* at 504-05.

[70] *Id.* at 504.

[71] *Id.*

intentional.[72] The misleading nature of the retention of the invalid provision was central to the court's holding.[73] The characterization of this conduct as gross negligence may be justified if the retention of the provision is considered in gross disregard of the rights of the public because of its tendency to mislead. A failure in the company's procedure should not have been sufficient to justify the imposition of punitive damages, since that is exactly the sort of "clerical error" that *Bellefonte* and *Consolidated American Life* held insufficient to justify punitive damages.[74]

The general rule is that recklessness can amount to willfulness in a tort requiring intentional conduct,[75] but when the defendant's conduct amounts only to simple negligence, the defendant does not have the state of mind necessary for the bad faith tort or to allow punitive damages.[76] For that reason, simple negligence provides an excuse barring bad faith recovery.[77]

C. When the Insurance Company Acts upon Advice of Counsel in Refusing to Pay a Claim, the Insurance Company Has an Arguable Basis to Litigate.

In bad faith cases, as in punitive damages cases generally, the reliance by the insurance company upon advice of counsel should provide an arguable basis or excuse for refusal to pay a

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[72] *See id.* at 505.

[73] *Id.*

[74] *See supra* notes 60-63 and accompanying text.

[75] W. PROSSER, *supra* note 67, § 34, at 184.

[76] *Id.* § 2, at 10.

[77] A recent article has attempted, contrary to *Bellefonte* and *Consolidated Life,* to raise doubt whether negligence forms an arguable reason or excuse. Walker, *supra* note 18, at 14-15. Walker argues that the agency rule imputing knowledge of any agent to the whole corporation forces a conclusion that an insurance company cannot claim company negligence as an arguable basis. This simply does not follow for three reasons. First, application of the agency principle would require some company agent to have knowledge of the fact that makes denial of the claim negligent. In other words, the agency rule would not apply in the situation when all of the company's agents negligently fail to investigate facts and thus fail to learn of a fact that shows liability. Second, Walker appears to have assumed that all company negligence will take the form of ignorance of either a legal rule or a fact. Finally, regardless of the question of knowledge of facts, a negligent error by the company that causes the denial of a claim, as in the two cited cases, could lead to denial *without the state of mind necessary for either an intentional tort or punitive damages.*

claim, for the same reason that this advice provides a defense in malicious prosecution cases: the defendant should be allowed to rely upon the advice of a lawyer as to what the law allows.[78] The Fifth Circuit recognized this in *Henderson v. U.S.F.&G. Co.*[79] as have courts of other jurisdictions.[80]

Every court that has faced the question whether advice of counsel bars actions requiring malice has recognized advice of counsel as at least a partial bar.[81] No jurisdiction has altogether rejected proof of advice of counsel as showing lack of malice. The cases presenting contract and insurance-related claims are of particular interest. In two insurance cases in which an insured alleged bad faith refusal to settle by his insurance company, the courts have held advice of counsel relevant.[82]

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[78] The assertion of the defense of advice of counsel has been held to constitute a waiver of the attorney-client privilege. *See* Wender v. United Serv. Auto. Ass'n, 434 A.2d 1372, 1373-74 (D.C. App. 1981).

[79] 695 F.2d 109, 113 (5th Cir. 1983) (*Henderson II*) ("We agree that good faith reliance on advice of counsel may prevent imposition of punitive damages.").

[80] *See infra* note 81.

[81] Nine jurisdictions have allowed the defense of advice of counsel in punitive damages cases. *See, e.g.*, Scalise v. Nat'l Util. Serv., 120 F.2d 938, 941-42 (5th Cir. 1941) (applying Florida law) (advice of counsel bars punitive damages in an action for wrongful interference with the business property of another); Phillips v. Morrow, 210 Ala. 34, 97 So. 130, 132 (1923) (defendant acted under advice of counsel so there was no malice and therefore no punitive damages in a false imprisonment action); Pre-Fit Door, Inc. v. Dor-Ways, Inc., 13 Ariz. App. 438, 477 P.2d 557, 560 (1970) (attorney for defendant testified to advice given and punitive damages were barred); Fox v. Aced, 49 Cal. 2d 381, 317 P.2d 608, 610-11 (1957) (advice of counsel is a defense to allegations of bad faith under California statute); Town Center Management Corp. v. Chavez, 373 A.2d 238, 245 (D.C. 1977) (advice of counsel is a factor but not a bar to recovery of punitive damages by tenant in action against landlord for locking tenant from apartment); Buie v. Barnett First Nat'l Bank of Jacksonville, 266 So. 2d 657, 660 (Fla. 1972) (advice of counsel is a defense but was not proven in an action for wrongful repossession); Cotton States Mut. Ins. Co. v. Trevethan, 390 So. 2d 724, 727 (Fla. App. 1980) (advice of counsel is a factor but not a complete bar in an insurance bad faith claim); Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 566-67, 141 So. 903, 904 (1932) (punitive damages inappropriate when defendant acted on advice of counsel in levying execution on plaintiff's property); Lujan v. Pendaries Properties, Inc., 96 N.M. 771, 635 P.2d 580, 584 (1981) (seller not liable for punitive damages for failure to convey property under real estate contract because seller acted on advice of counsel); Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 430, 285 N.E.2d 849, 852, cert. denied, 410 U.S. 431 (1972) (advice of counsel bars punitive damages in a bad faith claim against an insurer); Nueces Trust Co. v. White, 564 S.W.2d 798, 806 (Tex. Civ. App. 1978) (advice of counsel is a factor but not a bar to punitive damages in an action for wrongful withholding of an automobile title).

[82] Cotton States Mut. Ins. Co. v. Trevethan, 390 So. 2d 724, 728 (Fla. App. 1980);

In *Gordon v. Nationwide Mutual Insurance Co.*,[83] the New York Court of Appeals recognized that when an insurance company acts on advice of counsel, an insured is barred from suing his insurer for bad faith refusal to settle a claim. The court stated:

> It would be an extraordinary result to hold a client guilty of breach of good faith, with large punitive damages, because it acts upon advice of counsel—even mistaken advice—about the precedential stature of a single case in the Miscellaneous Reports. It would be even more extraordinary if liability could be imposed on a client for breach of good faith in following counsel's advice because an adversary lawyer disagrees with the legal merits of the advice given.[84]

In *Cotton States Mutual Insurance Co. v. Trevethan*,[85] a Florida court of appeals held that advice of counsel evidenced lack of malice but was not an absolute bar.[86]

In two cases alleging malicious conduct by parties to contracts, courts have held that advice of counsel barred the action.[87] *Fox v. Aced*,[88] presented the question whether the defendant's conduct in breaching a real estate contract constituted bad faith.[89] The California court held, "Exemplary damages are not recoverable against a defendant who acts in good faith and under advice of counsel."[90] The Fifth Circuit has followed *Fox*, stating that advice of counsel is appropriate under Mississippi law as a bar to the bad faith tort.[91]

Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 433, 285 N.E.2d 849, 852, *cert. denied*, 410 U.S. 431 (1972).

[83] 30 N.Y.2d 427, 285 N.E.2d 849, *cert. denied*, 410 U.S. 431 (1972).

[84] 285 N.E.2d at 852.

[85] 390 So. 2d 724, 728 (Fla. App. 1980).

[86] *Id.*

[87] Fox v. Aced, 49 Cal. 2d 381, 317 P.2d 608, 610-11 (1957); Lujan v. Pendaries Properties, Inc., 96 N.M. 771, 635 P.2d 580, 583-84 (1981).

[88] 49 Cal. 2d 331, 317 P.2d 608 (1957).

[89] 317 P.2d at 610. The action in *Fox* was essentially identical to the Mississippi (and California) common law bad faith action but was based upon a California statute allowing additional damages in a real estate contract when the seller breaches in bad faith. *Id.*

[90] *Id.*

[91] Henderson v. U.S.F.& G. Co., 695 F.2d 109, 113-14 (5th Cir. 1983) (*Henderson II*). The court of appeals held that the defense was not proven and was inapplicable because

In *Lujan v. Pendaries Properties, Inc.*,[92] the New Mexico Supreme Court recognized that advice of counsel was a bar to a claim for punitive damages on a real estate contract and reversed a trial court award of punitive damages.[93] The court stated that, because the defendant acted upon advice of counsel, his position, although wrong, "was not without some justification," and, therefore, his conduct could not justify punitive damages.[94]

The Mississippi Supreme Court has recognized that advice of counsel is a bar to punitive damages claims for the reason that one acting under this advice lacks the actual malice necessary to justify imposition of punitive damages.[95] In *Kalmia Realty & Insurance Co. v. Hopkins*,[96] the trial court had awarded the plaintiff attorney's fees in a case in which the plaintiff alleged "wrongful, willful and malicious acts . . . in causing the levy of execution on . . . [plaintiff's] property."[97] The Mississippi Supreme Court held attorney's fees appropriate only when punitive damages would be justified, stating:

> The proof shows that in the issuance and levy of the execution appellants acted under the directions and advice of a reputable and able attorney . . . . We do not think the proper construction of those statutes is so manifest or free from doubt as to render one guilty of a willful or malicious wrong, or negligence so gross as to show a reckless disregard of consequences, who acted upon the advice of counsel to the effect that the lien of the judgment was superior to the rights of the purchasers subsequent to the rendition of the judgment.[98]

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the company had attempted to hide the policy altogether, rather than assert a defense to it. *Id.; see supra* notes 55-57 and accompanying text.

[92] 96 N.M. 771, 635 P.2d 580 (1981).

[93] 635 P.2d at 583-84.

[94] *Id.* at 584.

[95] Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 566-67, 141 So. 903, 904 (1932).

[96] *Id.* at 556, 141 So. 903 (1932).

[97] *Id.* at 563, 141 So. at 903.

[98] *Id.* at 566-67, 141 So. at 904. This language was recently quoted by the Mississippi Supreme Court in Equity Servs. Co. v. Hamilton, 257 So. 2d 201, 207 (Miss. 1972). The court recognized advice of counsel as a defense in malicious prosecution cases in Pulliam v. Ott, 246 Miss. 739, 747, 150 So. 2d 143, 146-47 (1963). The defense arose again in Woodall v. Ross, 317 So. 2d 892 (Miss. 1975), in which the court concluded that be-

As the foregoing should make clear, advice of counsel should provide a defense against claims for punitive damages and actions requiring malice. This principle should apply in both contract and insurance settings. It is less well-settled whether advice of counsel alone is sufficient to bar recovery altogether or whether it is merely a factor to be weighed in deciding if the denial of a claim constitutes bad faith.

When action was taken on advice of counsel, and the proof met the test used in malicious prosecution cases for advice of counsel, three state supreme courts found awards of punitive damages erroneous, holding that as a matter of law advice of counsel barred recovery of punitive damages.[99] In these cases, the supreme courts of Alabama, New Mexico, and California held that advice of counsel was an absolute bar.[100] Three state courts of appeals have held, however, that advice of counsel is "no more than one factor . . . in determining whether the requisite malice is present."[101] No state supreme court has adopted this latter view.

The Mississippi cases that refer to advice of counsel outside the context of malicious prosecution do not state whether the defense is an absolute bar.[102] In *Henderson v. U.S.F.&G. Co.* the

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cause the defendant failed to prove what information he gave the attorney or what advice the attorney gave, and because the defendant did not call the attorney at trial, the defense was not proven. *Id.* at 896-97 (quoting 22 AM. JUR. 2D *Damages* § 253 (1965)).

[99] Phillips v. Morrow, 210 Ala. 34, 97 So. 130, 132 (1923); *Lujan*, 635 P.2d at 583-84; *Fox*, 317 P.2d at 610-11.

[100] *See supra* note 99.

[101] Town Center Management Corp. v. Chavez, 373 A.2d 238, 245 (D.C. 1977); *see* Cotton States Mut. Ins. Co. v. Trevethan, 390 So. 2d at 727-28; Nueces Trust Co. v. White, 564 S.W.2d 798, 806 (Tex. Civ. App. 1978). The Fifth Circuit has held that, in a 42 U.S.C. § 1983 (Supp. IV 1980) case, when malice is also at issue, reliance on advice of counsel is not an absolute defense but rather "among the calculus of facts that a jury is to consider on the issue of good faith." Crowe v. Lucas, 595 F.2d 985, 992 (5th Cir. 1979). In addition, Arizona appellate courts have taken apparently contradictory views on the issue. In one case, a court stated, "Punitive damages are not recoverable against a defendant who acts in good faith and under advice of counsel." Pre-Fit Door, Inc. v. Dor-Ways, Inc., 13 Ariz. App. 438, 477 P.2d 557, 560 (1970). This view indicates an absolute bar, but a later Arizona court of appeals indicated that the statement was overbroad. Huggins v. Deinhard, 127 Ariz. 358, 621 P.2d 45, 47-48 (Ct. App. 1980). Both statements are dicta to the nature of the defense; in the first, the issue was whether advice was provable, and in the second, the court found the advice to have been sought in bad faith.

[102] Henderson v. U.S.F.&G. Co., 695 F.2d 109, 113-14 (5th Cir. 1983) (*Henderson*

Fifth Circuit stated that "good faith reliance upon advice of counsel may prevent imposition of punitive damages."[103] Although such advice was not proved, the court cited *Fox v. Aced*, in which advice of counsel was held to be an absolute bar.[104] The prevailing opinion in *Standard Life Insurance Co. v. Veal*[105] does not mention advice of counsel, but the dissent argues that it *is* an absolute bar.[106] Advice of counsel was not proved, so the court did not decide this point.

Mississippi malicious prosecution cases do provide an answer to this question in an analogous context. In *Pulliam v. Ott*,[107] the Mississippi Supreme Court held that advice of counsel is an absolute bar to a malicious prosecution action. The court reasoned:

> It is permissible for a defendant to show that he consulted an attorney as a part of his defense to a charge of lack of probable cause and malice. Moreover, where it is shown that defendant divulged a true, full and fair statement of facts to his attorney, and that the prosecution was instituted in good faith, on the advice of said attorney, such facts, when established by a preponderance of the evidence to the satisfaction of the jury, is a complete defense to the charge of malicious prosecution.[108]

Pulliam states the general rule in malicious prosecution cases: advice of counsel establishes probable cause and bars the action.[109]

The general rule that such advice, sought in good faith and given upon full disclosure of the facts, is a bar to punitive damages should be adopted in bad faith cases. A defendant in a bad faith case and a defendant in a malicious prosecution case consult an attorney for the same reason: the party anticipates litiga-

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II); Equity Servs Co. v. Hamilton, 257 So. 2d 201, 207 (Miss. 1972); Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 566, 141 So. 903, 904 (1932).

[103] 695 F.2d at 113-14.

[104] *Id.* (citing *Fox*, 317 P.2d at 610-11).

[105] 354 So. 2d 239 (Miss. 1977).

[106] *Id.* at 251 (Smith, J., dissenting).

[107] 246 Miss. 739, 150 So. 2d 143 (1963).

[108] *Id.* at 747, 150 So. 2d at 146-47 (citing Winters v. Griffis, 233 Miss. 102, 101 So. 2d 346 (1958)).

[109] *See* W. PROSSER, *supra* note 67, § 120, at 854.

tion over a dispute and needs advice on whether to proceed with the litigation. As the New York court pointed out, "It would be an extraordinary result to hold such a defendant liable in such a case."[110] It would also be an unfair result, negating the whole purpose for which one would seek a lawyer's advice.

Because the same rationale justifies the advice of counsel defense in bad faith and malicious prosecution cases, Mississippi authority indicates that the defense should be an absolute bar.[111] As the preceeding discussion indicates, this would be the better rule. For these reasons, advice of counsel, sought in good faith and upon full disclosure of the facts, should provide an arguable basis or excuse for denial of a claim in a bad faith case.

III. Actual Damages in Bad Faith Cases

Because bad faith cases are essentially a fusion of tort and contract, the first step in understanding the kinds of damages recoverable in a bad faith action is distinguishing between tort and contract damages.[112] Classically, tort and contract damages are distinguished in their use of foreseeability. In contract actions, the only types of damages recoverable are those foreseeable at the time of contracting.[113] The rationale for this rule is that a contract promise is equivalent to the assumption of a known risk—the obligation to pay damages should performance not occur—and the contracting party only undertakes the risk foreseeable at the time of contracting.[114] In tort actions, the issue is whether the occurrence of any sort of injury is foreseeable, not whether specific types of injury are foreseeable. If *any* injury is foreseeable, recovery is allowed for each type of damage that proximately occurs, despite whether the specific item of damages

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[110] Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 285 N.E.2d 849, 852, *cert. denied*, 410 U.S. 431 (1972).

[111] *See supra* notes 108-09.

[112] The term "actual damages" as used in this section refers to extra-contractual damages. As far as fulfilling the requirement that punitive damages be supported by actual damages, recovery of damages upon the contract will suffice. Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 836 (Miss. 1979).

[113] The Mississippi Supreme Court most recently stated this concept in Consolidated Am. Life Ins. Co. v. Covington, 297 So. 2d 894, 898 (Miss. 1974).

[114] O.W. Holmes, *supra* note 9, at 300-02.

could have been foreseen.[115]

In cases of contracts to pay money, such as insurance contracts, the traditional measure of damages is the amount owed plus interest.[116] This traditional view is arguably *not* applicable in bad faith cases because a claim for bad faith recovery is an "independent tort" and thus tort damages can be recovered. The Mississippi Supreme Court addressed this issue without resolving it in *Travelers Indemnity Co. v. Wetherbee.*[117] If the court actually created an independent tort in *Standard Life Insurance Co. v. Veal,*[118] it would seem only logical to allow recovery of actual damages in tort. Injury from such a tort would be attendant to, but not coextensive with, that from the breach of contract, and therefore recovery of damages for the contract breach should not preclude additional recovery based on the tort.[119] As a practical matter, at least two kinds of actual damages will be asserted in any bad faith case, emotional distress damages and attorney's fees.[120]

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[115] 5 A. CORBIN, CORBIN ON CONTRACTS § 1019, at 113-15 (1964). For instance, with emotional distress damages, if the defendant's conduct could foreseeably cause *any* physical injury and causes emotional distress that results in a physical manifestation, the emotional distress is compensable. McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (applying Mississippi law); *see* RESTATEMENT (SECOND) OF TORTS § 436(1) (1965). This principle is applicable in cases when the defendant's conduct could foreseeably cause an injury that did not occur, but when emotional distress resulted from a near-miss. For instance, when the defendant, while negligently driving a car, almost hits the plaintiff, emotional distress from the near-miss would be compensable if it meets the other tests for emotional distress recovery. For a general statement of the tests for emotional distress damages, see *infra* notes 127-29 and accompanying text.

[116] *See* New South Corp. v. Godley, 301 So. 2d 307, 310 (Miss. 1974) ("Ordinarily where a contract to pay money is breached, interest is the measure of damages.").

[117] 368 So. 2d 829, 836 (Miss. 1979).

[118] 354 So. 2d 293, 247-48 (Miss. 1977).

[119] A. CORBIN, *supra* note 115, § 1076, at 429. See also RESTATEMENT (SECOND) TORTS § 908 comment b (1979), which states:

> [P]unitive damages . . . are not permitted merely for a breach of contract. When, however, the plaintiff has a right in the alternative to sue for a breach of contract or for a tort, the fact that his act or omission amounts to a breach of contract does not preclude the award of punitive damages if the action is brought for the tort and the tort is one for which punitive damages are proper.

[120] Other kinds of damages will be peculiar to the facts of each case. In a case involving automobile insurance, for instance, a plaintiff may make a claim for cab fare for the period during which, but for the alleged bad faith denial, the insured might have purchased or repaired an automobile with insurance proceeds. Another common damage claim in these cases seems to be for some injury to credit, resulting, typically, from the

For attorney's fees, Mississippi follows the general rule that absent a statutory provision, there can be no recovery "unless the facts are of such gross or willful wrong as to justify infliction of punitive damages."[121] This principle was applied in a bad faith case in *Aetna Casualty & Surety Co. v. Steele*.[122] Recovery of attorney's fees is contingent upon recovery of punitive damages.[123] If the jury awards no punitive damages, it should award no attorney's fees.

Recovery of damages for emotional distress is not as simple an issue.[124] Emotional distress damages can only be recovered if there is a tortious breach and are not recoverable for a contract breach alone. The clearest distinction between tort damages and contract damages is that emotional distress is not a compensable harm in contract actions.[125] For the plaintiff to recover for emotional distress in a bad faith case, the defendant's conduct must constitute an independent tort.[126]

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plaintiff's inability to borrow money because the insured car (or house) that he would have used as collateral was destroyed, and the insurance company failed to pay on the loss. For each of these claims there is at least a question of causation.

[121] City of Laurel v. Bush, 238 Miss. 718, 730, 120 So. 2d 149, 155 (1960) (quoting Cooper v. U.S.F.&G. Co., 186 Miss. 116, 122, 188 So. 6, 7 (1939); *see* Kalmia Realty & Ins. Co. v. Hopkins, 163 Miss. 556, 566, 141 So. 903, 904 (1932); Yazoo & M.V. Ry. v. Consumer's Ice & Power Co., 109 Miss. 43, 48-49, 67 So. 42, 43 (1915).

[122] 373 So. 2d 797, 801 (Miss. 1979) (citing Cooper v. U.S.F. & G. Co., 186 Miss. 116, 122, 188 So. 6, 7 (1939)).

[123] *See supra* notes 121-22 and accompanying text.

[124] It seems odd that "emotional distress" would commonly result from the breach of a commercial contract, but claims for emotional distress seem to be reflexively included in the complaints in bad faith cases. *See* W. DENTON & W. WALKER, *supra* note 8, at 17 (recommending including a claim for emotional distress in complaints in bad faith cases).

[125] RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981). The RESTATEMENT (SECOND) OF CONTRACTS takes a restrictive view of recovery of emotional distress damages, stating that they are recoverable only in contract actions when the contract is "of such a kind that serious emotional disturbance [is] . . . a likely result" of the breach, such as contracts for the carriage or disposition of dead bodies, and *not* for "[b]reach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy [which] may by chance cause even more severe emotional disturbance." RESTATEMENT (SECOND) OF CONTRACTS § 353 comment a (1981). This is true even if the defendant knows of the delicate health or sensitivity of the plaintiff. *Id.* § 353 illustration 1. The RESTATEMENT (SECOND) OF TORTS takes a broader view, holding that damages for emotional distress may be recovered when an actor's conduct results in forseeable physical harm through emotional distress. RESTATEMENT (SECOND) OF TORTS § 436(1) (1965).

[126] *See* Bolden v. John Hancock Mut. Life Ins. Co., 422 F. Supp. 28, 30-31 (E.D.

The easiest way to understand emotional distress as an element of damages is by dividing the cases into those in which bodily injury results from the emotional distress and those in which there is no bodily injury from the emotional distress. The Mississippi Supreme Court has adopted this division, holding that there can be recovery for emotional distress without physical injury only "[w]here there is something about the defendant's conduct which evokes outrage or revulsion."[127] In cases when there is a *negligent* infliction resulting in a "medically cognizable" physical illness, "which requires or necessitates treatment by the medical profession," the court has held that recovery is allowed for the physical injury caused by the distress.[128]

In cases in which no bodily injury results, recovery will be restricted to those instances when the plaintiff proves the tort of outrageous conduct.[129] This tort, as outlined by the *Restatement (Second) of Torts,* requires proof of conduct so extreme that it will almost never occur in a breach of contract setting. Even conduct intentionally inflicting emotional distress that results in no bodily injury is not compensable unless the *Restatement (Second)* test is met.[130] The *Restatement (Second)* states that one is liable "who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[131] The essential elements of this cause of action are the degree of outrageousness of the conduct and the degree of severity of the emotional distress. Recovery is allowed only when the distress is "so severe that no reasonable man could be expected to endure it."[132] The absence of shock, illness, or other bodily harm suf-

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Mich. 1976) (in a bad faith case, emotional distress damages would not be allowed unless there was proof of an independent tort for which such damages could be recovered).

[127] Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981). This rule dates back at least to Mississippi Power Co. v. Byrd, 160 Miss. 71, 77, 133 So. 193, 194-95 (1931).

[128] Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981).

[128] Only in cases of assault, outrageous conduct, or gross insults at the hands of a common carrier is recovery for emotional distress allowed without resulting bodily injury, with a possible additional exception in cases for loss of earning capacity. RESTATEMENT (SECOND) OF TORTS §§ 47, 436A 456 comment b (1965).

[130] *Id.* §§ 47, 312, 436A comment a.

[131] *Id.* § 46(1).

[132] *Id.* § 46(1) comment j.

fered after the distress is evidence that the emotional distress was not sufficiently severe for recovery.[133] The Mississippi Supreme Court has allowed recovery twice for emotional distress without bodily injury. In *Saenger Theatres Corp. v. Herndon,*[134] and *Lyons v. Zale Jewelry Corp.,*[135] the tortious conduct, verbal abuse by the defendants' agent, was so severe that the court found it shocking.[136] In both cases the plaintiff reacted with hysteria and shock sufficiently severe to require medical treatment.[137] These cases make clear the standards that must be met to recover damages for emotional distress when bodily injury does not occur. There must be proof of extraordinarily extreme and tortious conduct followed by a reaction that is profound and severe.[138]

Outside the foregoing rules, recovery for emotional distress is allowed only when the distress results in bodily injury.[139] This rule applies whether the distress inflicted was negligent or intentional.[140] Under this theory of recovery, if the defendant should have realized that his conduct "involved . . . [an] unreasonable risk of subjecting [the plaintiff] . . . to such emotional disturbance as would likely result in bodily harm,"[141] he can be liable

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[133] *Id.* § 46(1) comment k.

[134] 180 Miss. 791, 178 So. 86 (1938).

[135] 246 Miss. 139, 150 So. 2d 154 (1963). Two other similar cases are distinguishable. In Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935), preexisting ailments of which the defendant had knowledge were aggravated by the conduct. Since the defendant knew of the plaintiff's sensitivity, this case provides no guide for how severe a tortfeasor's conduct toward an ordinary man must be. *Id.* at 682, 161 So. at 755. In T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972), the issues on appeal did not present the question whether emotional distress damages were recoverable under the facts but rather whether an award of emotional distress damages supported an award of punitive damages. *Id.* at 485.

[136] *Lyons,* 246 Miss. at 143, 150 So. 2d at 155; *Herndon,* 180 Miss. at 798, 178 So. at 87.

[137] *Lyons,* 246 Miss. at 144-45, 150 So. 2d at 155; *Herndon,* 180 Miss. at 798, 178 So. at 87.

[138] *See supra* notes 134-37 and accompanying text.

[139] *See* RESTATEMENT (SECOND) OF TORTS §§ 47, 312, 436A comment a (1965).

[140] For intentional infliction, see RESTATEMENT (SECOND) OF TORTS § 312 comment a (1965) and for negligent infliction, see *id.* §§ 313 comment a, 436A, 456 comment b. The chief distinction between the two types is that one who negligently inflicts emotional distress does not take the risk that the victim is peculiarly sensitive but one who intentionally inflicts emotional distress does. *Id.* § 313 comment b.

[141] Doherty v. Mississippi Power Co., 178 Miss. 204, 215, 173 So. 287, 290 (1937)

if actual bodily harm results.[142] No physical impact is required for imposing liability.[143]

Recovery in these cases has consistently turned on the sufficiency of the proof of the bodily harm.[144] The court has required that the evidence of bodily injury not be "too vague and uncertain," and that it "must . . . be connected not only in time but in causation with the injury," to achieve a "standard of reasonable certainty."[145] The evidence must show more than nervousness and anxiety; it must show actual injury. For example, testimony by a plaintiff of "nervousness, sleeplessness and [being] upset for some time after the accident" was held inadequate proof for recovery as being "extremely vague, unsatisfactory and speculative."[146]

The conduct necessary for recovery of damages for emotional distress will not, of course, ordinarily be present in bad faith cases. This conduct might arise, however, if the insurance

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(quoting RESTATEMENT OF TORTS § 312 (1934)). Similar language to that quoted in *Doherty* is used in RESTATEMENT (SECOND) OF TORTS § 313(1) (1965), which recognizes liability when the actor "should have realized that his conduct involved an unreasonable risk of causing the [emotional] distress . . . and . . . from facts known to him should have realized that the distress . . . might result in . . . bodily harm."

[142] Doherty v. Mississippi Power Co., 178 Miss. 204, 215, 173 So. 287, 290 (1937).

[143] First Nat'l Bank v. Langley, 314 So. 2d 324, 334 (Miss. 1975). *Langley* rejected the impact rule in cases of negligent infliction of emotional distress; however, it was noted in McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980), that "it is doubtful that the impact doctrine ever applied to intentional [infliction of emotional distress]." *Id.* at 51 n.3 (citing Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963)). For a more recent application of the rule in *Langley*, see Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982). *Entex* arose out of a natural gas explosion at the plaintiff's house; the plaintiff was standing nearby at the time of the explosion. *Id.* at 439. Beyond citing *Langley*, the court also analyzed what was necessary for recovery when a plaintiff suffers emotional distress from observing an accident to a closely related victim. *Id.* at 444; *see 1982 Mississippi Supreme Court Review*, 53 MISS. L.J. 113, 172-75 (1983). For a view that damages for emotional distress by a father resulting from the injury of his child are not recoverable, see Johnson v. Ford Motor Co., 354 F. Supp. 645, 646, 648 (N.D. Miss. 1973). Although the father in *Johnson* did not witness the accident, the rule stated seems to apply even when the accident is witnessed. *Id.* at 649.

[144] In the one Mississipi bad faith case presenting an issue of recovery of damages for emotional distress, the court denied recovery for lack of competent evidence. Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 836 (Miss. 1979).

[145] Savery v. Gray, 51 So. 2d 922, 924 (Miss. 1951).

[146] Aldridge v. Johnson, 318 So. 2d 870, 872-73 (Miss. 1975). *See also* Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981); Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 71 (Miss. 1980).

company's claims investigator is verbally abusive to an insurance claimant, particularly with claims such as disability, when the insurance company may have knowledge of the claimant's delicate condition.[147] Otherwise, the requirement that there be either extremely outrageous conduct or a severe bodily injury makes it unlikely that bad faith will be a viable ground for emotional distress recovery. Emotional distress is the most significant item of actual damages generally sought in bad faith cases,[148] but the likelihood of substantial recovery of extra-contractual actual damages in bad faith cases is slim.[149]

IV. A Proposal for Trial Court Analysis of Bad Faith Cases

A. The Court Should Decide Whether There Is An Arguable Basis or Excuse

In resolving bad faith cases, and particularly when determining whether the proof was sufficient for punitive damages, the Mississippi Supreme Court appears to have used three methods of analysis, each of which is adapted to one of three recurrent issues in bad faith cases. The first method is used in cases involving a deliberate breach of contract but no proof that the breach was wanton, malicious, or oppressive. In such cases the court has quoted a line of cases predating *D.L. Fair Lumber Co. v. Weems*,[150] which hold that there must be "breach . . . at-

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[147] This occurred in Continental Casualty Co. v. Garrett, 173 Miss. 676, 682, 161 So. 753, 755 (1935).

[148] Attorney's fees, another item of damages that seems to be actual damages, functions in lock step with punitive damages and is thus inseparable from punitive damages as a practical matter. *See supra* notes 124-25 and accompanying text.

[149] Actual extra-contractual damages have not been recovered in a reported Mississippi bad faith case.

[150] 196 Miss. 201, 16 So. 2d 770 (1944). In *D.L. Fair*, the lumber company, a holder of a timber lease, continued to allow its timber cutter to destroy a pasture fence by felling trees across it despite repeated requests by the lessee of the pasture to terminate these actions. *Id.* at 216-17, 16 So. 2d at 771. The company ignored the requests and made no effort to repair the damaged fence despite knowledge of the continuing damage suffered by the lessee. *Id.*, 16 So. 2d at 771. The supreme court held this sufficient to justify the case going to the jury on the issue of punitive damages. *Id.* at 219, 16 So. 2d at 772.

tended by *intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort."*[151] It should be recalled that a willful or deliberate breach of contract without more is *not* an occasion for an award of punitive damages. Three cases have done little more than quote this language, describe the facts of the "tortious" act that accompanied the breach, and state that the trial court should have granted a peremptory instruction because "the proof in the present case does not reach the standard" for punitive damages.[152] In using this method of analysis the court is essentially requiring an intent to cause injury beyond that injury suffered in any breach of contract.

The second method of analysis is used in cases presenting genuine disputes over coverage or law. Such disputes furnish an arguable reason for refusing a claim. The court in these cases simply has quoted the language referring to an independent tort, has stated that "there was a legitimate or arguable reason not to pay the claim," and has held that there was no jury issue as to punitive damages.[153]

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[151] New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978) (emphasis added); *e.g.*, Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975).

[152] State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980); New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975). In *New Hampshire Ins. Co. v. Smith,* the court held that by the express policy language, the insurance company was entitled either to a medical report or to consultation with the claimant's doctor. 357 So. 2d at 121. Although the undisputed amount of the claimed medical bills greatly exceeded the amount of the medical payments coverage and the denial of the claim was wrongful because the company delayed paying the claim for two weeks after receiving the documentation called for by the policy, there was no basis to submit the punitive damages issue to the jury. *Id.* In *Progressive Casualty,* 317 So. 2d at 398, and *State Farm,* 379 So. 2d at 322, the court held that a dispute over the amount due precluded a punitive damages instruction. See also College Life Ins. Co. of Am. v. Byrd, 367 So. 2d 929, 931 (Miss. 1979), in which the court used this reasoning in a case presenting allegations of both bad faith and fraud.

[153] In three cases the supreme court has reversed trial courts on little more than this logic. *See* Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1306 (Miss. 1982); Gulf Guar. Life Ins. v. Kelley, 389 So. 2d 920, 923 (Miss. 1982); Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801-02 (Miss. 1979). In *Aetna Casualty,* the company litigated on the theory that there was no coverage. 373 So. 2d at 801-02. In *Consolidated American Life,* the insurance company was acting upon a "clerical error" or honest mistake. 410 So. 2d at 1306. In *Gulf Guaranty Life,* the company litigated a case of first impression. In each of these three cases the insurance company, although wrong, had an

The third method of analysis is based on the principle that simple negligence does not constitute an independent tort that will justify an award of punitive damages.[154] In these cases, the court has simply held that when a claim is negligently denied, there can be no bad faith recovery.

In general, these methods amount to little more than statements of general rules and descriptions of fact situations of individual cases. This approach essentially establishes a case-by-case analysis of what constitutes bad faith, since the court has not set forth explicit guidelines that a trial court could follow in trying bad faith cases.

These three methods of analysis have been applied only to cases in which punitive damages were improper. The Mississippi Supreme Court has only twice affirmed trial court awards of punitive damages in bad faith cases. In *Travelers Indemnity Co. v. Wetherbee*,[155] the refusal to pay the claim was for an improper motive. Although one element of the claim was undisputed and due under one of three separate coverages in the policy, the company refused to pay because it contested liability under the two other coverages and had a practice of settling the entire loss under a policy at one time. This practice was used to pressure the insured to settle an undisputed claim for a sum less than was actually due and resulted in a finding of bad faith.[156] In the other case in which the court affirmed a trial court award of punitive damages, *Standard Life Insurance Co. v. Veal*,[157] the insurance company's interpretation of the policy was contrary to

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arguable reason to litigate.

[154] In Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387 (Miss. 1978), the trial court refused to submit the issue of punitive damages to the jury when there was no more than company negligence in investigating the claim. In affirming, the supreme court held that negligent failure to more thoroughly investigate the claim was not such an intentional wrong, insult, abuse, or gross negligence to justify the recovery of punitive damages. *Id.* at 391; *see also* Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1306 (Miss. 1982) (no recovery of punitive damages when company negligence in the form of a clerical error led to denial of the claim). The Fifth Circuit has held in a bad faith case that gross negligence will justify a punitive damages instruction. Richards v. Allstate Ins. Co., 693 F.2d 502, 504-05 (5th Cir. 1981).

[155] 368 So. 2d 829 (Miss. 1979).

[156] *Id.* at 834-35.

[157] 354 So. 2d 239 (Miss. 1977).

the policy's express language.[158]

One puzzling aspect of the Mississippi Supreme Court's handling of bad faith cases is the extraordinary willingness to weigh the facts of each case to determine whether the proof was sufficient for punitive damages.[159] Nothing in the express language of the cases explains why the court would appear to intrude on the jury's province in this area. The elements of the tort, however, provide an explanation for this enhanced role of the court. The question of arguable basis or excuse is initially a question of the legal sufficiency of the defendant's position. Only after the court has determined that the defendant did not have an arguable basis to deny the claim, and force the plaintiff to litigate, will it consider the questions of malice, intent, and the propriety of punitive damages.[160] Implicit in the Mississippi court's approach is a role for the trial court that calls for the court to first determine whether there is present an arguable basis or excuse before submitting the issue to the jury.

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[158] *Id.* at 247-48.

[159] The Mississippi Supreme Court has reversed and rendered trial court awards of punitive damages in all but two bad faith cases. *See* Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1305-06 (Miss. 1982) (negligence provided an arguable basis or excuse); Gulf Guar. Life Ins. Co. v. Kelley, 389 So. 2d 920, 922-23 (Miss. 1980) (case of first impression provided basis to litigate); State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980) (dispute over amount of claim provided basis to litigate); Aetna Casualty & Sur. Co. v. Steele, 373 So. 2d 797, 801-02 (Miss. 1979) (coverage question provided basis to litigate); New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978) (plaintiff's failure to comply with policy condition provided basis to litigate); Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977) ("[n]othing in the record" supported punitive damages award); Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975) (dispute over amount of claim provided a basis to litigate). In *Wetherbee*, 368 So. 2d at 835-36, and *Standard Life*, 354 So. 2d at 248, trial court awards were affirmed.

The Mississippi Supreme Court has never reversed a trial court for refusing a punitive damages instruction. The Fifth Circuit reversed for that reason, because "arguable basis or excuse" did not play its usual role since the defendant had concealed the existence of a policy, making any asserted arguable basis a pretext rather than a genuine basis to deny. Henderson v. U.S.F.&G. Co., 620 F.2d 530, 536-37 (5th Cir.), (*Henderson I*), *cert. denied*, 449 U.S. 1034 (1980). In one other case the Fifth Circuit reversed the trial court for failing to make a finding concerning the existence of an arguable reason. Black v. Fidelity & Guar. Ins. Underwriters, Inc., 582 F.2d 984, 990-91 (5th Cir. 1978). The court affirmed a trial court refusal to grant a punitive damages instruction. Henderson v. U.S.F.&G. Co., 695 F.2d 109, 113 (5th Cir. 1983) (*Henderson II*); Richards v. Allstate Ins. Co., 693 F.2d 502, 504-05 (5th Cir. 1982).

[160] *See supra* cases cited in note 159.

This procedure is similar to that the court uses in resolving one of the questions in a malicious prosecution action. The plaintiff in a malicious prosecution case must show that the prior action, to which his suit for malicious prosecution is a response, was instituted without probable cause. This question is initially one of law for the court to decide.[161] The question is whether the malicious prosecution defendant, who instituted the prior action, had a reasonable basis to do so. If the malicious prosecution defendant had a reasonable basis to institute the prior proceeding, there was probable cause, and any ulterior motive (malicious or otherwise) is immaterial. The existence of a genuine dispute between the parties to a civil action establishes probable cause as a matter of law.[162] Similarly, in a bad faith case, the issue is whether there is a "genuine dispute," that is, whether the insurance company had an arguable basis to deny the claim and litigate. As in a malicious prosecution case, the question is primarily a legal one.[163]

The use of this approach in bad faith cases is supported by the Mississippi Supreme Court's method of resolving these cases rather than by explicit language in the court's opinions. As stated, the cases do not lay down such explicit rules. The cases do clearly indicate a willingness by the supreme court to play a central role in deciding the essential issue of liability in bad faith cases. This willingness is evidenced by the court's detailed factual discussion of arguable basis or excuse in each bad faith

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[161] RESTATEMENT (SECOND) OF TORTS §§ 672, 681B (1977). The analogy is not intended to suggest that the substantive requirement of probable cause is kindred to the element of arguable basis or excuse in a bad faith case. The analogy is to the *procedure* for determination.

[162] *See* W. PROSSER, *supra* note 67, § 120 at 854 (party instituting action must have a "reasonable belief . . . [in] a good chance of prevailing . . . [and] may . . . submit a doubtful issue of law, where it is uncertain which view the court will take").

[163] Arguable basis or excuse and probable cause are both mixed questions of law and fact under the method for distinguishing questions of law and fact suggested by Hart and Sachs. *See* H. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 375-76 (Tentative Ed. 1958) (legal questions ask "What is the applicable legal principle?" and factual questions ask "What happened?"; a mixed question asks "What is the legal significance of what happened?"). Although arguable basis or excuse is a mixed question it is primarily a legal question, involving an analysis of the legal position of a defendant in denying the claim.

case and by the high reversal rate in bad faith cases.[164] The court can only make such a detailed factual analysis because it considers the existence of an arguable basis or excuse a question for the *court.*

The Fifth Circuit has recognized that the trial court must consider the arguable basis question before submitting the punitive damages issue to a jury. In *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.,*[165] the court of appeals stated:

> The district court should have determined whether, on these "facts," the insurance company had a legitimate or arguable reason to refuse the claim. This determination requires analysis of whether the alleged oral representation constituted a valid renewal of plaintiff's policy. The question . . . is best left to the district court in the first instance . . . . If there is no arguable basis under Mississippi law for contending that the oral representation was ineffective, plaintiff is entitled to have the issue of punitive damages submitted to a jury.[166]

In *Black,* the Fifth Circuit reversed the trial court's directed verdict because the court failed to initially determine whether there was an "arguable reason or excuse" for refusing to pay the claim.[167] As stated, it appears that the Mississippi Supreme Court expects the trial court to make the determination referred to in *Black,* because that is the only reasonable explanation for the detailed factual analysis the court has undertaken in each bad faith case. Under this analysis, only in the clearly exceptional case in which the *court* (not the jury) finds a lack of either arguable basis or excuse will these cases go to the jury on the issue of bad faith.[168]

This approach is sound from the standpoint of both theory and policy. The allocation of functions between court and jury

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[164] *See supra* cases cited in note 159.

[165] 582 F.2d 984 (5th Cir. 1978).

[166] *Id.* at 990-91.

[167] *Id.*

[168] The careful consideration given to lack of existence of an arguable basis or excuse in Richards v. Allstate Ins. Co., 693 F.2d 502, 504-06 (5th Cir. 1982), also fits this analysis since, but for the enhanced role for the court on this issue, *Richards* would have presented a simple fact question that the court would have summarily disposed of absent clear error. *See supra* notes 67-72 and accompanying text.

ensures that the court decides the primarily legal question of arguable basis or excuse, in much the same way that the court determines probable cause in a malicious prosecution action.[169] The only role the jury has in determining probable cause is in resolving strictly factual questions. The *Restatement (Second) of Torts* describes the respective functions of court and jury in malicious prosecution cases and the method for allocating these functions:

> In actions for malicious prosecution . . . upon the [issue] . . . of probable cause, the jury has only the function of finding the circumstances under which the defendant acted. The court determines whether, under those circumstances, the termination was sufficiently favorable to the accused, and whether the defendant had or had not probable cause. If there is no conflict in the testimony as to what the circumstances were, the court has no need for a finding of the jury. The jury is not called upon to act unless there is a conflict in the testimony that presents an issue of fact for its determination.
>
> The respective functions of the court and jury in determining the issue of probable cause can be exercised by them in one of two ways. The better but less usual method is to require the jury to find a special verdict setting forth the circumstances under which they find that the proceedings were initiated. Upon these findings the court then determines whether the defendant had probable cause. The usual method is for the court to charge the jury under what combination or combinations of circumstances, which may be found under the evidence, the defendant did or did not have probable cause for initiating the proceedings.[170]

The *Restatement (Second)* comment notes that the jury is instructed either by special verdict or by hypothetical, both of which ask the jury only to decide what happened, with the court to decide whether the facts as found constitute probable cause. The hypothetical method of instruction has been used in Mississippi,[171] but before the adoption of the Mississippi Rules of Civil

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[169] The allocation in malicious prosecution actions is described in the RESTATEMENT (SECOND) OF TORTS §§ 673, 681B (1977).

[170] *Id.* § 673 comment e.

[171] *See, e.g.*, Pulliam v. Ott, 246 Miss. 739, 746, 150 So. 2d 143, 146 (1963). The

Procedure, the Mississippi Supreme Court held in *Flournoy v. Brown*[172] that special verdicts were not to be used in the state. Although the court's statement in *Flournoy* that such instructions were not available in Mississippi may have been incorrect,[173] the previous Mississippi rule has been changed by the adoption of the rules of civil procedure, which, like the Federal Rules, expressly provide for use of special verdicts.[174]

The Mississippi Supreme Court recognized the use of the hypothetical question method of jury instruction in malicious prosecution cases quite early. In 1856, in *Greenwade v. Mill*,[175] the court described the allocation of functions between court and jury in terms almost identical to that of the *Restatement (Second) of Torts*. The court in *Greenwade* explained that probable cause was a question of law, that is, a question of the legal sufficiency of the defendant's position when he filed the prior suit.[176] This is also the issue present in a bad faith case, in which the question is the legal sufficiency of the defendant's position when the claim was denied. The court determines which sets of contested facts in a malicious prosecution case constitute probable cause, and, in a bad faith case, should determine which sets

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hypothetical method was also used in Lancaster v. Pitts, 154 Miss. 406, 411, 122 So. 531, 533 (1929), and McNulty v. Walker, 64 Miss. 198, 200, 1 So. 55, 56 (1887).

[172] 200 Miss. 171, 181, 26 So. 2d 351, 355-56 (1946).

[173] *See* State v. Allen, 69 Miss. 508, 517-18, 10 So. 473, 475 (1892) (special verdict used in suit by the state on a performance bond); MISS. R. CIV. P. 49 comment (special verdicts were once recognized in Mississippi, but their use seemed to have waned).

[174] MISS. R. CIV. P. 49(b) & comment; *see* N. McNeel, *Juries and Jury Verdicts—Rules 38, 48-51, and 59*, 52 MISS. L.J. 163, 165-66 (1982). The Mississippi rule adopts Federal rule 49(a), which provides for special verdicts and which was adopted as Mississippi rule 49(b). Federal rule 49(b), providing for special interrogatories, was omitted from the Mississippi Rules. Thus, a verdict by questions on each element of the cause of action—a special verdict—is specifically allowed, but a general verdict with questions only on some elements—special interrogatories—is not specifically allowed. *See* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2501 (1971); 76 AM. JUR. 2D 20 *Trial* § 1175 (1975). The special verdict is the form suggested to instruct the jury on probable cause by the RESTATEMENT (SECOND) OF TORTS. Note that in dicta in a recent case the Mississippi Supreme Court has confused the issue of the propriety of special verdicts in this state's courts, stating "This state has never used special verdicts of interrogatories, however, and there is no question before us of the propriety of any jury instruction." Owens v. Kroger Co., No. 53,668, slip op. at 7 n.2 (Miss. April 20, 1983).

[175] 31 Miss. 464 (1856).

[176] *Id.* at 468.

of contested facts constitute arguable basis or excuse. The hypothetical or special verdict in a bad faith case should be designed to ask the jury to decide which set of facts is true and, in the case of the hypothetical, it should explain to the jury which set of facts do or do not constitute an arguable basis or excuse.[177]

B Given the Absence of an Arguable Basis or Excuse, the Court Should Consider Whether a Punitive Damages Instruction Is Proper on the Facts.

Generally, when punitive damages are sought, and the court decides that an intentional tort has been proven, it must then decide whether the facts are so egregious to warrant a punitive damages instruction since the commission of a tort alone does not justify an award of punitive damages.[178] The propriety of a

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[177] As the analogy would suggest, a malicious prosecution model instruction is the best source for designing a jury instruction in a bad faith case. The theory suggested in the text was followed in granting an instruction in a recent case. Shaw v. Stewart, CA No. 10,193-L (Lafayette County Circuit Court). Here, the defendant insurance company had denied an insured's claim and asserted at trial that the denial was based on the plaintiff's failure to pay the insurance premium in the manner provided by the policy. The following instruction was granted:

> The Court instructs the jury that if you find from a preponderance of the evidence in this case that . . . the defendant insurance company did not have an honest belief based upon reasonable grounds that the plaintiff failed to pay the insurance premium in the manner and within the time provided by the contract . . . then the defendant denied the claim without arguable basis or excuse.

This instruction was based upon a malicious prosecution instruction. *See* MISSISSIPPI CIRCUIT COURT JUDGES ASSOCIATION & THE MISSISSIPPI JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS § 32.01 (1977). The importance of the instruction is that it tells the jury which set of facts constitutes an arguable basis or excuse. Because the factual elements of *Shaw* that related to arguable basis or excuse were relatively simple, this instruction was given by hypothetical. As factual elements grow more numerous and independent the number of factual combinations contained in a hypothetical will become too great for the jury to comprehend. Therefore, such a case should follow the RESTATEMENT (SECOND) OF TORTS and instruct the jury by special verdict. *See* RESTATEMENT (SECOND) OF TORTS § 673 comment e (1977) (special verdicts are preferable to hypotheticals in instructing the jury on the issue of probable cause). The instruction given in *Shaw* also required proof that the defendant had denied the claim "primarily for reasons other than the fact that it believed it had a reasonable basis to deny the claim."

[178] *See* W. PROSSER, *supra* note 67, § 2, at 9-10. Every unjustified breach of contract is not necessarily an appropriate instance for a punitive damages instruction. For instance, it would be unlikely that a refusal to pay a promissory note in accordance with its terms, but without an arguable reason or excuse, would sustain a claim for punitive

punitive damages instruction should be decided in a bad faith case just as it is in any tort case, and in *any* intentional tort case the court must first determine whether any facts justify an award of punitive damages.[179] The defendant's conduct and state of mind are particularly important in deciding whether to submit the punitive damages issue to the jury.[180]

Courts in other jurisdictions have considered this issue in the context of bad faith cases and have held that proof of the elements of the bad faith tort alone is not sufficient to justify a punitive damages instruction.[181] There is a distinction between tortious conduct and conduct sufficiently wrongful to warrant an award of punitive damages.[182] As a result, "It does not follow that because the plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages.[183] Oppression, fraud, or malice must be shown in addition to bad faith.[184] The Wisconsin Supreme Court, in *Anderson v. Continental Insurance Co.*,[185] described this distinction as applied to a bad faith case in terms of the defendant's malice or intent to injure:

> [T]here is a distinction between the intent or malice necessary to maintain an action for intentional tort (such as bad faith) and the intent which must be shown to recover punitive damages. For punitive damages to be awarded in addition to compensatory for the tort, there must be a showing of an evil intent deserving of punishment or of something in the nature of

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damages.

[178] *See* Bradley v. Associates Discount Corp., 230 Miss. 131, 138-39, 92 So. 2d 468, 471-72 (1957); Illinois Central R.R. v. Dodds, 97 Miss. 865, 869, 53 So. 409-10 (1910); Chicago, St. Louis, & New Orleans R.R. v. Scurr, 59 Miss. 456, 461 (1882).

[180] *See* W. PROSSER, *supra* note 67, § 2 (intent to injure, fraud, evil motive, spite, or malice defines requisite conduct).

[181] *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Corwin Chrysler-Plymouth, Inc. v. Weschester Fire Ins. Co., 279 N.W.2d 638, 645 (N.D. 1979); Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368, 379 (1978).

[182] Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981).

[183] Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974), *quoted in* Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981).

[184] Corwin Chrysler-Plymouth, Inc. v. Weschester Fire Ins. Co., 279 N.W.2d 638, 645 (N.D. 1979).

[185] 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

> special ill-will or wanton disregard of duty or gross or outrageous conduct . . . . For punitive damages to be awarded, a defendant must not only intentionally have breached his duty of good faith, but in addition must have been guilty of oppression, fraud, or malice.[186]

In other contexts Mississippi has recognized the "malice" necessary to prove an intentional tort is not the same as the "malice" necessary for punitive damages.[187] The difference between the two types of malice is of kind, not degree. Malice to prove an intentional tort—malice in law—is the intent to perform a wrongful act; malice sufficient for punitive damages—malice in fact—is the intent to injure or some equivalent, such as recklessness.[188] Although malice in fact is not always necessary for liability for an intentional tort, *both* malice in fact and malice in law are necessary for punitive damages.[189] The Mississippi court has recognized this rule in wrongful repossession cases.[190] The court has held that to obtain a punitive damages instruction in a wrongful repossession case one must prove malice in fact, that is, malice in the sense of fraud, insult, or intent to injure. Neither malice in law (the willful violation of a right) nor mere injury will suffice. Only injuries inflicted with a spirit of wanton disregard of the rights of another will justify an award of punitive damages.[191] The reason for this is that two

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[186] 271 N.W.2d at 379.

[187] *See* West Bros., Inc. v. Barefield, 239 Miss. 530, 541-42, 124 So. 2d 474, 480 (1960) (punitive damages awarded when injuries wantonly inflicted); Bradley v. Associates Discount Corp., 230 Miss. 131, 138, 92 So. 2d 468, 471-72 (1957) (same).

[188] *See* W. PROSSER, *supra* note 67, § 2, at 9-10 & n.65.

[189] *See id.* § 2, at 10 n.65 (malice "does not include the 'legal malice' implied in such torts as defamation"). In a case involving the forceful repossession of land by self-help, the California Supreme Court stated, "Damages of an exemplary character could only be assessed against the defendants upon a showing of malice in fact as distinguished from malice in law." Walker v. Chanslor, 153 Cal. 118, 94 P. 606, 608 (1908), *overruled in part*, Daluiso v. Boone, 71 Cal. 3d 484, 455 P.2d 811, 819-21, 78 Cal. Rptr. 707 (1969) (overruling right to use self-help to recover real property).

[190] In Bradley v. Associates Discount Corp., 230 Miss. 131, 92 So. 2d 468 (1957), the plaintiff proved wrongful repossession of an automobile by the defendant. *Id.* at 139, 92 So. 2d at 471-72. The trial court refused to instruct the jury on punitive damages, and the Mississippi Supreme Court affirmed, stating that no substantial evidence in the record showed that the defendant "used trickery or chicanery, or made false representations, to obtain possession of the automobile. *Id.*, 92 So. 2d at 471-72.

[191] West Bros., Inc. v. Barefield, 239 Miss. 530, 541-42, 124 So. 2d 474, 480 (1960);

kinds of willfulness are required for punitive damages to be awarded; there must be a wrongful act (1) intentionally performed *and* in (2) willful and gross disregard of rights or with a totally unjustified intent to injure the plaintiff.[192] As the *Restatement (Second) of Torts* points out, the defendant's conduct must be extreme, "involving some element of outrage similar to that usually found in a crime."[193] Along the same lines, the Mississippi Supreme Court, in *Fowler Butane Gas Co. v. Varner,*[194] stated that the injury must evidence "some element of aggression or some coloring of insult, malice or gross negligence, evidencing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule.[195] In bad faith cases these principles applicable to all punitive damages cases should require that a trial court determine whether aggravating circumstances beyond the wrongful denial of the claim are present before a punitive damages instruction can be given to the jury.[196]

The Mississippi bad faith cases have not directly addressed this question. The seminal case, *Standard Life,* did contain language to the effect that, for an award of punitive damages, there must be "some element of aggression or some coloring of insult,

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Bradley v. Associates Discount Corp., 230 Miss. 131, 137-38, 92 So. 2d 468, 471-72 (1957).

[192] Milner Hotels, Inc. v. Brent, 207 Miss. 892, 899, 43 So. 2d 654, 655 (1949). "[T]he elements allowing punitive damages are: (1) a wrongful act, (2) intentionally performed, (3) gross disregard of [the plainitff's] rights, and (4) willfullness." *Id.* at 899, 43 So. 2d at 655. Thus, in addition to a willful tort, there must be a conscious intention to injure the plaintiff, or there must be acts so grossly negligent to be the equivalent of such an intention. Bounds v. Watts, 159 Miss. 307, 311, 131 So. 804, 805 (1931). The supervisory power discussed in the text is enhanced in cases of negligence, when the court must decide whether the negligence amounted to recklessnes. *See* McDonald v. Moore, 159 Miss. 326, 332, 131 So. 824, 825 (1931) (in a negligence case "[g]reat deference must be given to the judgment of the trial judge in passing upon the case as to whether there is proof sufficient to submit punitive damages"); Mississippi Power Co. v. Byrd, 160 Miss. 71, 76-77, 133 So. 193, 194 (1931) (court analyzed facts for evidence of simple negligence or recklessness); Interstate Oil Pipe Line Co. v Valentine, 236 Miss. 400, 405-07, 110 So. 2d 369, 371-72 (1959) (same).

[193] RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

[194] 244 Miss. 130, 141 So. 2d 226 (1962).

[195] *Id.* at 150-51, 141 So. 2d at 233.

[196] Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297, 301 (1976). The North Carolina court, in surveying the law of bad faith, pointed out that even the cases of the most liberal state, California, involve aggravating circumstances beyond an intentional breach. 229 S.E.2d at 303.

malice, or gross negligence."[197] The Mississippi Supreme Court has reversed awards of punitive damages when it found no proof of such aggravating circumstances, holding that "the proof in the present case does not reach the standard" for punitive damages.[198] The Mississippi cases holding that punitive damages were appropriate have generally considered the aggravating circumstances without explicitly considering the question whether these circumstances were actually necessary for the award.

There is apparently contrary dicta in *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*, in which the Fifth Circuit reversed a summary judgment on the issue of punitive damages because the trial court had failed to make a finding on the issue of arguable basis or excuse.[199] The court of appeals stated, "If there is no arguable basis under Mississippi law for contending that the oral representation was ineffective, plaintiff is entitled to have the issue of punitive damages submitted to the jury."[200] Although the holding in *Black* is that the trial court erred in failing to decide the issue of arguable basis or excuse, this dicta may indicate that a finding of lack of arguable basis or excuse alone justifies the submission of punitive damages to the jury.

An examination of the Mississippi bad faith cases in which awards of punitive damages were affirmed or held appropriate shows that the aggravating circumstances in all but one of the cases are clear.[201] In *Henderson I*[202] and *II*,[203] the insurance

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[197] 354 So. 2d at 247.

[198] *See supra* note 152.

[199] 582 F.2d at 990.

[200] *Id.* at 991.

[201] The cases are Henderson v. U.S.F.&G. Co., 695 F.2d 109, 112-14 (5th Cir. 1983) (*Henderson II*); Richards v. Allstate Ins. Co., 693 F.2d 502, 504-06 (5th Cir. 1982); Henderson v. U.S.F.&G. Co., 620 F.2d 530, 536-37 (5th Cir. 1980) (*Henderson I*), *cert. denied*, 449 U.S. 1034 (1980); Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 834-35 (Miss. 1979); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247-48 (Miss. 1977). In *Travelers* and *Standard Life*, the Mississippi Supreme Court affirmed awards of punitive damages. 368 So. 2d at 834-35; 354 So. 2d at 247-48. In *Henderson I*, the Fifth Circuit reversed a trial court order withholding the issue of punitive damages from the jury. 620 F.2d at 536-37. In *Henderson II* and *Richards* the Fifth Circuit affirmed jury awards of punitive damages. 695 F.2d at 112-14; 693 F.2d at 504-06; *see also* Black v. Fidelity & Guar. Ins. Underwriters, Inc., 582 F.2d 984, 990-91 (5th Cir. 1978) (Fifth Circuit reversed because trial court failed to make a determination as to arguable basis or

company concealed the existence of the policy, knowingly preventing the plaintiff from being able to accept a settlement within the policy limits with a third party. In *Travelers Indemnity Co. v. Wetherbee,*[204] Travelers knew of the dire financial straits in which their conduct had placed the plaintiffs, and Travelers used this situation to take advantage of the plaintiffs.[205] In *Richards v. Allstate Insurance Co.,*[206] the company knowingly retained an invalid provision in the policy. The court held that by retaining this provision the company misled the public about their coverage, in gross disregard of the public's rights.[207]

While *Henderson I, Henderson II, Travelers,* and *Richards* involved bad faith plus aggravating circumstances, it is hard to say just what justified a punitive damages instruction in *Standard Life.*[208] When compared to *Lincoln National Life Insurance Co. v. Crews,*[209] which had quite similar facts, the award of punitive damages in *Standard Life* is "inexplicable."[210] There were no aggravating facts in *Standard Life* beyond an intentional and wrongful denial of a claim. This lack of aggravating circumstances may substantiate the dicta in *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.* to the effect that proof of the bad faith tort alone, without proof of malice in fact, suffices to entitle the plaintiff to a punitive damages instruction. The dissent in *Standard Life* considered the lack of aggravating circumstances a bar to a punitive damages instruction, stating,

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excuse). In *Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 376-77 (5th Cir. 1982), the plaintiff-appellant argued that she had a right to a jury instruction on both punitive damages and extra-contractual damages, stating in her brief, "The Mississippi decisions have used language equivalent to the test for punitive damages and, hence, the same as the test for the independent tort of bad faith." *Id.* at 377. The Fifth Circuit held that punitive damages were inappropriate since the bad faith tort was not proven. *Id.* at 376-77.

[202] 695 F.2d 109 (5th Cir. 1983) (*Henderson II*).

[203] 620 F.2d 530 (5th Cir.), *cert. denied,* 449 U.S. 1034 (1980) (*Henderson I*).

[204] 368 So. 2d 829 (Miss. 1979).

[205] *Id.* at 835.

[206] 693 F.2d 502 (5th Cir. 1982).

[207] *Id.* at 505.

[208] 354 So. 2d at 247-48.

[209] 341 So. 2d 1321 (Miss. 1977).

[210] *1978 Mississippi Supreme Court Review,* 49 MISS. L.J. 301, 385 (1978).

"This is not a situation which casts Standard in the role of villain or that reflects that its actions were wanton or oppressive."[211] The dissent does not argue with the prevailing opinion's statement of the law, but *does* argue that the circumstances could not justify a punitive damages instruction.[212]

The bad faith tort functions under the rules governing intentional torts generally. Given the rationale for the tort and the elements of the tort, there is no basis for placing it outside the rules that govern intentional torts generally. The logic of this argument was recognized in *Michael v. National Security Fire & Casualty Co.*,[213] when, after holding that punitive damages were not proper if the insurer has a legitimate or arguable reason for failing to pay, the court stated, "Moreover, such damages may not be awarded absent a finding of 'some intentional wrong, insult abuse or gross negligence which amounts to an independent tort'."[214] This conduct is what the court should look for after it has already decided whether the bad faith tort was proved, and if all that is present is a wrongful refusal to pay, without any aggravating circumstances, no punitive damages instruction should be given.

CONCLUSION

The principle that an insurance company or other contracting party cannot abuse a position of strength in breaching a contract is sound from the perspective of public policy. Mississippi bad faith cases to date have done little more than lay the groundwork for the tort based on this principle. The lack of clarity in the case law has made it exceedingly difficult for either plaintiffs or defendants to evaluate the merits of a bad faith claim. Adopting the position that the question of arguable basis or excuse is one for the court would significantly clarify this area. Before instructing the jury, the court should examine the

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[211] 354 So. 2d at 252 (Smith, J., dissenting).

[212] The weak precedential value of *Standard Life* should be noted. *Standard Life* was a 4-4 affirmance, with the ninth Justice abstaining because he had tried the case in the court below. *Id.* at 239, 249.

[213] 458 F. Supp. 128 (N.D. Miss. 1978).

[214] *Id.* at 131-32 (citing Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977)).

record and decide, as a matter of law, whether the insurer had an arguable reason or excuse for denying the claim. The existence of an arguable reason or excuse would preclude an award of punitive damages despite the presence of actual malice. If the court *does* decide that the defendant acted without arguable reason or excuse, it must then decide whether the proof justifies a punitive damages instruction, under the general rules for recovery of punitive damages, particularly the traditional requirements concerning state of mind and actual malice. Adoption of the foregoing analysis, combined with a clarification of the principles governing the concept of arguable basis or excuse, should resolve any confusion created by *Standard Life* and would also place Mississippi at the forefront in delineating the development of this new tort.

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COMMENTS

MANDATORY ASSESSMENT OF DAMAGES AGAINST AN UNSUCCESSFUL APPELLANT: A CONSTITUTIONAL ANALYSIS

Introduction

Since 1857, Mississippi has imposed a mandatory penalty on parties who unsuccessfully appeal to the Mississippi Supreme Court.[1] Section 11-3-23 of the Mississippi Code requires, upon affirmance of an appeal, that the appellant be charged fifteen percent of the original judgment as damages.[2] The concept of a penalty to deter frivolous ap-

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[1] Miss. Rev. Code, ch. 63, art. 12 (1857). The 1857 Code imposed mandatory damages of five percent of the judgment if the appellant failed to prosecute an appeal or if the judgment were affirmed on appeal. *Id.* In 1880, the statute was amended to specify the types of judgments to which it applied. Miss. Rev. Code § 1422 (1880). The amount of the penalty was increased to fifteen percent in 1980. Miss. Code Ann. § 11-3-23 (Supp. 1982).

[2] Miss. Code Ann. § 11-3-23 (Supp. 1982). Section 11-3-23 provides:

> In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the

peals or to compensate an appellee for the costs of appeal is not unfamiliar to other court systems; most states and the federal courts provide for the discretionary imposition of damages.[3] Only Mississippi and Alabama, however, require that the penalty be assessed regardless of the merits of a particular case.[4] This comment reviews Mississippi's application of the penalty and the constitutional problems inherent in the mandatory imposition of a penalty against an unsuccessful appellant.

I. Application of Statute in Mississippi

The section 11-3-23 penalty is mandatorily imposed on an unsuccessful appellant if (1) a final judgment (2) of the type specified by the statute is (3) affirmed unconditionally (4) by the Mississippi Supreme Court.[5] The Mississippi Supreme Court has held that the statute is highly penal and must be strictly construed;[6] therefore, the penalty will not be imposed unless the four prerequisites are clearly met.[7]

A. Final Judgment

The original judgment must represent a final adjudication of the case;[8] appeals of interlocutory orders or decrees are not subject to the

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above penalty shall not be assessed against any condemnee appealing from the special court of eminent domain in any circumstances.

Id.

[3] *See, e.g.*, Fed. R. App. P. 38 (single or double costs and damages may be awarded if court determines appeal is frivolous); Fla. Stat. Ann. § 59.33 (West 1969) (court may assess damages not exceeding 10% against appellant who appeals in bad faith or for delay); Ga. Code Ann. § 5-6-6 (1982) (10% damages may be awarded when appeal is taken only for delay); Ind. R. App. P. 15(G) (1981) (damages not exceeding 10% may be assessed if court affirms judgment); La. Code Civ. Proc. Ann. art. 59.33 (West 1969) (court may award damages for frivolous appeals); Mass. Gen. Laws Ann. ch. 211, § 10 (West Supp. 1982) (court may assess damages not exceeding 12% or double costs if appeal is frivolous or for delay).

[4] *See* Ala. Code § 12-22-72 (1975). For an analysis of the Alabama statute, see Comment, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations*, 32 Ala. L. Rev. 197, 211 (1980).

[5] Miss. Code Ann. § 11-3-23 (Supp. 1982).

[6] *E.g.*, Lowicki v. Lowicki, No. 53,598, slip. op. at 4 (Miss. Apr. 20, 1983); McKendrick v. Lyle Cashion Co., 234 Miss. 325, 340, 106 So. 2d 509, 511 (1958); Canal Bank & Trust Co. v. Brewer, 147 Miss. 885, 923, 114 So. 127, 128 (1927).

[7] *See* Wallace v. Jones, 360 So. 2d 932, 933 (Miss. 1978); Koehring Co. v. Hyde Constr. Co., 236 So. 2d 377, 381 (Miss. 1970).

[8] Miss. Code Ann. § 11-3-23 (Supp. 1982).

penalty.[9] A final judgment is defined as "one that makes an end of the controversy, determines the costs, and leaves nothing further for the court to act upon so far as the merits of the issues are concerned."[10] The court's rationale for limiting the applicability of the statute to final judgments is based on the fundamental difference between appeals of final and interlocutory orders: an appellant has an absolute right to appeal a final judgment but an interlocutory appeal requires the permission of the court.[11] Therefore, section 11-3-23 damages are applicable only when the appellant is solely responsible for the appeal.[12]

B. Judgments Specified by Statute

The supreme court has stated:

> [The section 11-3-23 penalty is only assessed] if the judgment or decree affirmed is for: (1) a sum of money, (2) possession of real or personal property, (3) dissolution of an injunction or other restraining process involving real or personal property, (4) the sale of property or some interest in it to satisfy a sum out of the proceeds of the sale, (5) enforcement or establishment of a lien, charge or claim upon property or some interest in property.[13]

The supreme court has also held section 11-3-23 to require that the judgment or decree establish a claim before damages may be assessed. In *Bancroft v. Martin*,[14] the plaintiff sued for specific performance of a contract to convey certain real property.[15] The trial court dismissed the complaint, finding that the plaintiff had no right to the property. The plaintiff appealed and the supreme court affirmed, but

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[9] *See* Canal Bank & Trust Co. v. Brewer, 147 Miss. 885, 922-23, 114 So. 127, 127-28 (1927).

[10] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 610 (2d ed. 1950); *see* Sample v. Romine, 193 Miss. 706, 738-40, 10 So. 2d 346, 349 (1942) (because court retained jurisdiction to hear further issues, appeal was from interlocutory decree).

[11] Canal Bank & Trust v. Brewer, 147 Miss. 885, 922-23, 114 So. 127, 127 (1927); *see* MISS. CODE ANN. § 11-51-7 (Supp. 1982) (appeal of interlocutory order available only upon approval by court or chancellor).

[12] Canal Bank & Trust v. Brewer, 147 Miss. 885, 922-23, 114 So. 127, 127 (1927). Because the court's approval is necessary for an interlocutory appeal, the court and appellant share responsibility for the appeal. *Id.*, 114 So. at 127.

[13] Wallace v. Jones, 360 So. 2d 932, 933 (Miss. 1978).

[14] 144 Miss. 384, 109 So. 859 (1926).

[15] *Id.* at 392, 109 So. at 860.

denied the appellee's request for statutory damages because the judgment established no claim to the property.[16]

Section 11-3-23 further specifies the means by which the damages are to be calculated. If the judgment is for a sum of money, the damages consist of fifteen percent of that sum.[17] Some judgments, such as those in workers' compensation cases,[18] consist of a formula by which to figure the amount of periodic payments. In these instances, the court will assess damages if the judgment is reduceable to a sum by simple mathematical calculations.[19] If the judgment is for the possession of real or personal property, the court must assess the damages against the value of the property.[20] But if the judgment or decree is for

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[16] *Id.*, 109 So. at 860. By requiring that the judgment establish a claim, the court avoids the problem of determining how to assess the damages against an unsuccessful plaintiff who appeals. *See infra* note 77.

[17] MISS. CODE ANN. § 11-3-23 (Supp. 1982).

[18] The § 11-3-23 penalty expressly applies to workers' compensation awards made by the circuit court and appealed to the Mississippi Supreme Court. *See* MISS. CODE ANN. § 71-3-51 (1972).

[19] *See* Railway Express Agency v. Hollingsworth, 221 Miss. 688, 697, 75 So. 2d 639, 640 (1954). The court will only assess damages against those payments that are certain; therefore, payments that are not due at the time of affirmance are not subject to the penalty. *See* Mid-State Paving Co. v. Farthing, 233 Miss. 333, 341, 101 So. 2d 850, 852 (1958) (penalty allowed on all workers' compensation benefits that had become due and were unpaid at time of affirmance); United States Fidelity & Guar. Co. v. Collins, 231 Miss. 319, 342, 96 So. 2d 456, 456 (1957) (damages allowed on all installments due and unpaid). But see Lowicki v. Lowicki, No. 53,598, slip op. (Miss. Apr. 20, 1983), in which the supreme court established a different rule for the application of § 11-3-23 damages to domestic relations cases. The court held:

> [Section 11-3-23 damages are applicable to all] decrees for a sum or sums of money or for the possession of real or personal property.
>
> (a) where the appellant has assigned on appeal an error which, if it had been sustained by this Court, would have resulted in a loss by appellee of the lower court's award of the money or property (including any necessary repayments), *and*
>
> (b) only
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> (1) where the decree affirmed by its terms contemplates complete performance by appellant in the immediate future, e.g., a single lump sum payment, *or*
>
> (2) where any delay in performance provided in the decree is in substantial part for the benefit of appellant.

Lowicki, slip op. at 4. Applying this test, the court found the damages to be assessable against the entire lump sum alimony award payable in annual installments, the one-time payments for an automobile and for legal fees, and the appellant's interest in real property. But prior case law indicates that damages should have been assessed against those periodic alimony and child support payments that were due and unpaid. *See, e.g., Collins,* 231 Miss. at 342, 96 So. 2d at 456.

[20] MISS. CODE ANN. § 11-3-23 (Supp. 1982).

the dissolution of an injunction or other restraining process on real or personal property, for the sale of property to satisfy a sum for the proceeds, or for the enforcement of a lien, charge, or claim in the property, the damages are assessed against the value of the interest in property or the value of the judgment, whichever is less.[21] Unlike a judgment for a sum of money, a judgment involving property seldom recites a value of the property. In such a case, the supreme court will remand the suit to the lower court for a determination of value.[22]

The statutory damages are assessed only against those items in controversy on appeal.[23] The question of damages arises most often in property cases in which a particular interest rather than the entire property is at issue. For example, if a tenant fails to pay rent, the lessor can generally sue for the unpaid rent or bring suit to eject the tenant. If the lessor sues for rent that is due, the subject of the litigation is the rental payments, not the property.[24] If the lessor sues to eject the tenant, the leasehold interest is in controversy.[25] The entire property can be brought into issue if the tenant alleges he has possession through ownership or through a contract to purchase.[26] In each of

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[21] *Id.*

[22] *Id.; see* Hart v. Catoe, 393 So. 2d 1346, 1347 (Miss. 1981) (case remanded for valuation of property); Garner v. Townes, 134 Miss. 791, 801, 100 So. 20, 22 (1924) (suit remanded to determine present value of insurance policy).

[23] *See* Parker v. Claypool, 223 Miss. 213, 220, 78 So. 2d 884, 885 (1947). The damages are also assessed only against the amount of the judgment. In United States Fidelity & Guar. Co. v. Yost, 183 Miss. 65, 84-85, 185 So. 564, 564 (1939), the original judgment was for $25,000 plus interest, which accrued until paid. The court assessed the penalty against the appellant only for the $25,000. If the lower court "had added the interest then due on the $25,000 thereto, and rendered a judgment for the aggregate amount, the damages thereon would of course be 5 percent of this aggregate amount." *Id.* at 84, 185 So. 2d at 564. In Koehring Co. v. Hyde Constr. Co., 236 So. 2d 377, 382 (Miss. 1970), the trial court aggregated the principal and interest, and the supreme court, following *Yost*, assessed the penalty against the whole amount. *Id.*

[24] *See* Hawkins Hardware Co. v. Crews, 176 Miss. 434, 442, 169 So. 767, 769-70 (1936) (court rejected appellee's argument that entire property was brought into dispute because it had been attached as security for unpaid rent).

[25] *See* Claughton v. Ford, 202 Miss. 361, 368-70, 32 So. 2d 751, 752 (1947). In *Claughton*, the appellee sued for possession of property rented to the appellant. When the judgment for the appellee was affirmed, the appellee argued that the damages should be assessed against the value of the property. The court held that the suit was not one to establish a claim to the whole property; rather, the suit sought to determine a leasehold interest. Therefore, the action was remanded to ascertain the value of the leasehold for an assessment of damages. *Id.*, 32 So. 2d at 751-52.

[26] *See* Hodges v. Jones, 197 Miss. 107, 117, 19 So. 2d 917, 917 (1944). In *Hodges*, the appellee sued to recover possession of property rented to the appellant. In defense to the suit, the appellant argued that he had possession of the property through a contract to

these three examples, the item in controversy is different, and the value of the judgment would differ in each situation.

C. *Unconditionally Affirmed Judgment*

The requirement that the judgment be unconditionally affirmed is satisfied by order of the court, by the appellant's failure to prosecute the appeal,[27] or by the appellant's voluntary dismissal of the action.[28] Any modification of the judgment, including remittitur or reversal in part, makes the appellee ineligible for the damages.[29]

D. *Judgment Affirmed by the Mississippi Supreme Court*

Although section 11-3-23 expressly provides that the judgment must be appealed to and affirmed by the Mississippi Supreme Court,[30] section 11-51-79 of the Mississippi Code extends the application of the section 11-3-23 penalty to appeals from county court to circuit court.[31] Whether the statute applies when a judgment in a federal diversity action is affirmed was considered by the Fifth Circuit Court of Appeals in *Walters v. Inexco Oil Company*.[32] The Fifth Circuit found that the statute would be applicable in federal diversity actions only if it were

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purchase the land. Damages were awarded to the appellee based on a valuation of the entire property. *Id.*, 19 So. 2d at 917.

[27] *See* Johnson, Ltd. v. Signa, 410 So. 2d 1320, 1321 (Miss. 1982).

[28] *See* Pearl River Valley Supply Dist. v. Brown, 254 Miss. 453, 456, 181 So. 2d 631, 632 (1966); *see also* MISS. CODE ANN. § 11-3-11 (1972) (voluntary dismissal of appeal has effect of affirmance).

[29] *See* Shivers v. Biloxi-Gulfport Daily Herald, 236 Miss. 303, 311, 110 So. 2d 359, 362-63 (1959) (damages not allowed when supreme court granted workers' compensation benefits previously denied); Ford v. Commercial Sec. Co., 220 Miss. 157, 166, 72 So. 2d 201, 201 (1954) (order of remittitur by supreme court has practical effect of reversal); Shipman v. Lovelace, 215 Miss. 141, 144-45, 60 So. 2d 559, 560-61 (1952) (no damages awarded when appellant received some relief not previously granted); Mississippi Highway Comm'n v. Burwell, 206 Miss. 490, 497, 40 So. 2d 263, 263 (1949) (appellee not entitled to damages when affirmance conditioned on remittitur).

[30] MISS. CODE ANN. § 11-3-23 (Supp. 1982).

[31] MISS. CODE ANN. § 11-51-79 (1972) provides, "If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties as is provided in affirmances in the supreme court." For a discussion of the application of the penalty in appeals from county court to circuit court, see Johnson, Ltd. v. Signa, 410 So. 2d 1320 (Miss. 1982), and Excel Saw & Tool Co. v. Micor Corp., 265 So. 2d 926 (Miss. 1972). The application of § 11-51-79 is limited to appeals from county court; the circuit court may not impose the penalty on a workers' compensation case appealed from the Workmen's Compensation Commission. *See* Bradshaw v. Rudder, 227 Miss. 143, 148, 85 So. 2d 778, 780 (1956).

[32] 670 F.2d 476 (5th Cir. 1982).

substantive rather than procedural law.[33] The court has certified the question to the Mississippi Supreme Court.[34]

E. Status of Appellant

If these four prerequisites are met, the statute requires that the unsuccessful appellant be charged fifteen percent of the judgment.[35] The appellant is considered to be the party who first initiates the appeal; an appellee who cross-appeals is not subject to the penalty.[36] Although the statute does not specifically classify appellants, the penalty works in different ways depending on the status of the appellant at trial. First, if a defendant appeals a judgment for the plaintiff, the penalty increases the amount the defendant must pay the plaintiff-appellee.[37] Second, when a plaintiff who won in the lower court, but who is dissatisfied with the amount of the judgment, appeals, the statutory penalty has the effect of reducing the amount the appellee must ultimately pay the plaintiff-appellant.[38] Third, section 11-3-23 is inappli-

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[33] *Id.* at 477-78. In Proctor v. Gissendaner, 587 F.2d 182 (5th Cir. 1979), the Fifth Circuit held that Alabama's mandatory penalty was substantive law and should be applied in federal diversity actions. *Id.* at 184; *see also* Comment, *supra* note 4, at 225-26 (mandatory nature of statutory rights, which created vested rights, was significant factor in holding that the statute was substantive law).

[34] 670 F.2d at 478; *see* Miss. S. Ct. R. 46 (allowing questions to be certified to the Mississippi Supreme Court by United States Supreme Court and by federal courts of appeals). The Mississippi Supreme Court has not yet responded to the certified question. The parties have requested oral argument, which has been scheduled for August, 1983. Telephone interview with Office of the Clerk of the Mississippi Supreme Court (May 27, 1983).

In Richards v. Allstate Ins. Co., 693 F.2d 502 (5th Cir. 1982), a federal diversity action, the Fifth Circuit affirmed the judgment of the district court and, in an unreported opinion, summarily denied the appellee's motion for damages pursuant to § 11-3-23. Interview with William Walker, counsel for appellee, in Oxford, Mississippi (Mar. 4, 1983).

[35] Miss. Code Ann. § 11-3-23 (Supp. 1982). "It is mandatory on the Court to include this statutory damage in its judgments of this character and it is always done by its Clerk in recording the judgment unless omitted by him through mistake." Claughton v. Ford, 202 Miss. 361, 369, 32 So. 2d 751, 751-52 (1947); *see also* Chrismond v. Chrismond, 213 Miss. 189, 193, 56 So. 2d 482, 484 (1952) (not necessary for court to refer to penalty in opinion).

[36] *See* Housing Auth. of Gulfport v. Barbee, 283 So. 2d 591, 592 (Miss. 1973).

[37] *See* McGee v. Clark, 346 So. 2d 914, 916 (Miss. 1977).

[38] *See* Pearce v. Ford Motor Co., 235 So. 2d 281, 283 (Miss. 1970). In *Pearce*, the court relied on the analysis of legislative history in Eagle Lumber & Supply Co. v. Robertson, 161 Miss. 17, 135 So. 499 (1931). When the first predecessor of § 11-3-23 was enacted, it provided for a penalty to be assessed "[i]f the judgment or decree affirmed be for a sum of money *adjudged or decreed against the appellant.*" Miss. Rev. Code § 1422

cable to a plaintiff who appeals a judgment for the defendant[39] because there is no judgment on which to assess the penalty.[40]

F. Mandatory Assessment of Damages in Other Jurisdictions

Under other state statutes that provide for damages on appeal, the court is given discretion subject to statutory limitations.[41] Some statutes limit the damages to double costs or a maximum percentage of the judgment.[42] The courts are also limited by the purposes articulated in the statutes, which usually provide for damages only when the appeal is unmeritorious, frivolous, or taken in bad faith or for delay.[43] A court's discretion may be further limited by judicial interpretations of the statutory requirements. The standards established by the courts are stringent, allowing damages to be imposed only when an appeal is taken "solely for delay,"[44] or "totally without merit,"[45] and never in

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(1880) (emphasis added). The inclusion of the language "adjudged or decreed against the appellant" foreclosed penalizing a dissatisfied plaintiff-appellant. The appellant in *Eagle* argued that the omission of this language in the 1906 Code and in subsequent enactments "was for the reason that the words omitted were surplusage, and added nothing to the plain intent of the Legislature as expressed in the statute without them." 161 Miss. at 22, 135 So. at 499. The *Pearce* court adopted the view sustained in *Eagle* that by the omission, the legislature intended to broaden the scope of the statute. 235 So. 2d at 283. Three justices dissented in *Pearce* arguing that the omission should not be interpreted to change the meaning of the statute without evidence of legislative intent. *Id.* at 284.

[39] *See* Wallace v. Jones, 360 So. 2d 932, 933 (Miss. 1978) (statute makes no provision for penalizing unsuccessful plaintiff-appellants).

[40] *See infra* note 77 and accompanying text (discussion of court's rationale for denying damages when unsuccessful plaintiff-appellant's action was dismissed by lower court).

[41] *See supra* note 3 and accompanying text.

[42] *See, e.g.*, FLA. STAT. ANN. § 59.33 (West 1969) (damages not to exceed 10%); IND. R. APP. PROC. 15(G) (1980) (same); MASS. GEN. LAWS ANN. ch. 211, § 10 (West Supp. 1982) (double costs from time when appeal is taken plus 12% interest on judgment).

[43] *See, e.g.*, FED. R. APP. P. 38 (damages recoverable for defending frivolous appeals); FLA. STAT. ANN. § 59.33 (West 1969) (damages recoverable for defending appeals taken in bad faith or for delay).

[44] *See* Scales v. American Lease Plans, Inc., 163 Ga. App. 670, 266 S.E.2d 323, 325 (1980) (damages due to delay are granted only when court of appeals is fully convinced the case was appealed for delay only); Krick v. Farmers and Merchants Bank, 151 Ind. App. 7, 279 N.E.2d 254, 261 (1972) (costs and damages assessed because record replete with tactics of delay, bad faith, and harassment).

[45] *See* Brown v. Rooks, 239 Ga. App. 770, 229 S.E.2d 548, 549 (1976) ("statute authorizing award of damages in event of nonmeritorious appeal applies only when issue *appealed* is obviously without merit" and "not when issue *tried* in court below is nonmeritorious").

doubtful cases.[46]

II. Constitutional Analysis of Section 11-3-23

An analysis of the constitutionality of the section 11-3-23 penalty must begin with an understanding of the requirements of the due process and equal protection clauses.[47] The United States Supreme Court has held that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review."[48] But, if a state does afford an appeal, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."[49] Since an appellant has no right to any appellate procedure, any barrier to appeal created by section 11-3-23 does not violate the due process clause;[50] however, if the statute works to deny any appeal "capriciously or arbitrarily" to some, it violates the equal protection clause.[51]

A. Equal Protection

The equal protection clause does not completely forbid classifications by state statutes;[52] most statutes do establish classifications and many statutes unevenly distribute benefits and burdens.[53] Therefore, in assessing an equal protection challenge, the Supreme Court will in-

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[46] *See* Almond v. Beatley Gray, Inc., 138 Ga. App. 508, 226 S.E.2d 776, 777 (1976).

[47] U.S. Const. amend. XIV, § 1, states in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[48] Lindsey v. Normet, 405 U.S. 56, 77 (1972); *see* Griffin v. Illinois, 351 U.S. 12, 18 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937); Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930); Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536 (1926); Standard Oil Co. v. Missouri, 224 U.S. 270, 287 (1912).

[49] Lindsey v. Normet, 405 U.S. 56, 77 (1972); *see* Blackledge v. Perry, 417 U.S. 21, 25 n.4 (1974); Mayer v. City of Chicago, 404 U.S. 189, 193 (1971); Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966).

[50] *See supra* text accompanying note 48.

[51] *See supra* text accompanying note 49.

[52] *See, e.g.*, Personnel Admin. of Mass. v. Feeney, 442 U.S. 271, 280-81 (1979) (equal protection clause did not deny state power to classify in favor of veterans); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70-71 (1978) (police jurisdiction statute denying non-residents the right to participate in city elections did not violate equal protection clause); Kotch v. Board of River Pilots, 330 U.S. 552, 556 (1947) (state statute requiring pilots who are state officers to navigate all ships through harbor was not violative of equal protection).

[53] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (statute that permits only lawyers to engage in business of debt adjustment held not to violate equal protection).

validate only those classifications that do not meet a standard of review specified by the Court.[54] Only statutes affecting fundamental rights or suspect classifications merit the most stringent review.[55] Classifications based on gender or illegitimacy receive intermediate review,[56] and economic classifications are given low scrutiny review.[57] Section 11-3-23 does not affect a fundamental right because there is no fundamental right to appeal,[58] nor does section 11-3-23 create a suspect classification.[59] Therefore, section 11-3-23 would be given low scrutiny review. Using low scrutiny, a statute will be upheld if it is rationally related to a legitimate legislative purpose.[60] To overturn a statute, it must be shown that there is no logical connection between the statutory purpose and the classification created by the statute.[61]

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[54] *See* Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 867 (1980).

[55] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (classification that interferes with fundamental right to marry requires strict scrutiny); Loving v. Virginia, 388 U.S. 1, 12 (1967) (statute prohibiting biracial marriage discriminates on basis of race and was subject to strict scrutiny).

[56] *See, e.g.*, Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142, 150, 152 (1980) (statute denying workers' compensation benefits to husband for wife's death discriminated on basis of sex because it did not serve important governmental interest and was not substantially related to advancement of that interest); United States v. Clark, 445 U.S. 23, 27 (1980) (statutory classification denying death benefits to illegitimate children of federal employee violated equal protection clause because it did not bear evident and substantial relation to statutory purpose).

[57] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("grandfather" clause allowing only certain pushcart vendors to continue business was economic regulation and subject to low scrutiny); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976) (state statute that discriminated between in-state and out-of-state scrap processors was reasonably related to statutory purpose).

[58] *See supra* note 48 and accompanying text.

[59] The statute discriminates on the basis of wealth, but this is not a suspect classification. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (state provisions for funding public education that benefitted wealthier neighborhoods subjected to low scrutiny). The statute also discriminates between the status of parties at trial, that is, between plaintiffs and defendants. *See supra* notes 37-40 and accompanying text.

[60] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (statute prohibiting sale of milk in plastic nonreturnable containers upheld because ban might foster greater use of environmentally desirable alternatives); Vance v. Bradley, 440 U.S. 93, 111 (1979) (statute requiring Foreign Service participants to retire at age 60 upheld because requirement rationally relates to Government objective of assuring competent personnel).

[61] *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) (limiting food stamps to households composed of related persons violated equal protection).

The Supreme Court has not clearly articulated the method used to ascertain legislative purpose. In 1980, in *United States Railroad Retirement Board v. Fritz*,[62] the Court, using the "conceivable basis" test, rejected an equal protection challenge to the Railroad Retirement Act of 1974.[63] The Court relied on a statutory purpose advanced by the Railroad Board that was actually contrary to the articulated purpose of the legislation.[64] The advanced purpose gave "plausible reasons for Congress' action"[65] and thus ended the Court's inquiry. In the same Term, the Court used the "articulated purpose" method of determining legislative purpose in upholding the Social Security Act in *Schweiker v. Wilson*.[66] The Court refused to rely on any conceivable state of facts as it had in *Fritz*[67] and instead searched the legislative history for an identifiable purpose to support the classification created by the statute.[68] Although the statutes in *Fritz* and *Wilson* were both upheld, the method of establishing legislative purpose in *Wilson* provides a heightened level of scrutiny. Despite the possibility that the test could be determinative of a case's outcome, the Court has not explained its use of different tests in similar situations.[69]

The Supreme Court has only once addressed the issue of the imposition of a mandatory penalty on an appellant when a judgment is affirmed. In 1916, in *Louisville & N.R.R. v. Stewart*,[70] the Court upheld a Kentucky statute that imposed a ten percent penalty on the appel-

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[62] 449 U.S. 166 (1980).

[63] *Id.* at 179. *See generally* 4 W.N. ENG. L. REV. 429, 431-32 (1982) (use of "conceivable basis" test affords great deference to legislature). A revision of the Railroad Retirement Act rendered certain groups of employees ineligible for benefits. These employees brought a class action suit challenging the Act, alleging that it violated the equal protection clause because of its irrational classification. *Id.* at 171-73.

[64] *See* 4 W.N. ENG. L. REV. 429, 435 (1982). The Court found the classifications to be reasonably related to the goal of "protect[ing] the relative equities of the employees and [providing] benefits to career railroad employees." 449 U.S. at 177. The articulated purpose of the enactment, however, was to protect those with rights vested under the earlier Act. *See id.* at 185 (Brennan, J., dissenting).

[65] 449 U.S. at 179. The Court noted that only "plausible reasons" were needed because the line-drawing process used in enacting statutes is a legislative rather than a judicial consideration. *Id.*

[66] 450 U.S. 221 (1981). *See generally* 4 W.N. ENG. L. REV. 429, 432 (1982) ("articulated basis" test prohibits justification of statute by *post hoc* purpose). In *Schweiker*, residents of public mental health facilities challenged the constitutionality of the Social Security Act because they were denied benefits under the Act. 450 U.S. at 224-25.

[67] *See supra* notes 63-65 and accompanying text.

[68] 450 U.S. at 235.

[69] *See* 4 W.N. ENG. L. REV. 429, 447 (1982).

[70] 241 U.S. 261 (1916).

lant when judgments stayed on appeal by a supersedeas bond were affirmed.[71] The Court concluded, "There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."[72] Because the Court relied heavily on the granting of a supersedeas bond to trigger the imposition of the penalty, *Stewart* is not conclusive of the issue raised by statutes similar to section 11-3-23. Section 11-3-23 is applied to any appellant who meets the statutory requirements, regardless of whether the judgment has been stayed by supersedeas.[73]

In a 1978 decision, *Wallace v. Jones*,[74] the Mississippi Supreme Court upheld section 11-3-23 against an equal protection challenge.[75] The trial court had ordered specific performance of an option contract for the purchase of land, and Wallace appealed.[76] The appellant argued that the statute is not applied evenhandedly because a plaintiff appealing a lower court decision for the defendant is not subject to the penalty.[77] The court concluded, "The statute does not discriminate against a class of litigants because all unsuccessful appellants, whether plaintiff or defendant, are subjected to . . . damages where the judgment or decree appealed from permits recovery."[78] Losing plaintiffs who appeal are not subject to the penalty because the statute is not applicable

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[71] *Id.* at 263-64.

[72] *Id.* at 263.

[73] *See* Tigner v. McGehee, 60 Miss. 242, 243-44 (1882) (penalty imposed regardless of whether judgment stayed by supersedeas bond).

[74] 360 So. 2d 932 (Miss. 1978).

[75] *Id.* at 934.

[76] *Id.* at 933. Jones and Wallace had entered an option contract providing for Jones to purchase land from Wallace. The Mississippi Supreme Court affirmed the chancery court's decree for specific performance without opinion. Wallace v. Jones, 358 So. 2d 393 (Miss. 1970).

[77] 360 So. 2d at 933. The appellant cited McGee v. Clark, 346 So. 2d 914 (Miss. 1977), and Bancroft v. Martin, 144 Miss. 384, 109 So. 859 (1926), both of which dealt with § 11-3-23 damages in an action for specific performance of an option contract involving land. 360 So. 2d at 933. In *McGee*, the trial court held for the plaintiff and the defendant appealed; upon affirmance, the penalty was imposed. 346 So. 2d at 916. In *Bancroft*, the trial court dismissed the plaintiff's complaint. When the plaintiff appealed and the judgment was affirmed, damages were not allowed. 144 Miss. at 392, 109 So. 2d at 860. The *Bancroft* court held that the predecessor to § 11-3-23 was not applicable because no claim in the property was established and therefore the judgment was not one of the types specified in the statute. *Id.*, 109 So. at 860. In *Wallace*, the appellant argued that the statute did not facilitate equal justice because Jones, the purchaser, could rely on *McGee* to receive damages if he prevailed at the trial level and could rely on *Bancroft* to avoid damages if he lost. 360 So. 2d at 933.

[78] 360 So. 2d at 933.

when the judgment of the lower court does not permit recovery by one of the parties.[79] Therefore, because the statute on its face does not discriminate against unsuccessful plaintiff-appellants, the court concluded that the statute does not violate the equal protection clause.[80] The court failed to examine whether the statute as applied is discriminatory.

In 1972, in *Lindsey v. Normet*,[81] the United States Supreme Court invalidated the Oregon Forceful Entry and Wrongful Detainer Statute, which was analogous to section 11-3-23 and which posed a barrier to appeal by discriminating against those who could not post a double bond.[82] According to the Oregon statute, the posting of a double bond was a prerequisite to an appeal and upon affirmance of the judgment, the appellee collected the entire amount of the bond, that is, twice the amount of the original judgment.[83] The appellants in *Lindsey* sought a declaratory judgment, alleging that the statute was unconstitutional on its face.[84]

The *Lindsey* Court emphasized that states are free to enact procedural provisions to discourage insubstantial appeals and to protect litigated property, but those statutes will only be upheld if "uniformly and nondiscriminately applied."[85] The Oregon statute was invalidated because the double bond bore no reasonable relation to rent accrued or to any damage suffered by the landlord.[86] Furthermore, the statute discouraged meritorious as well as frivolous appeals and discriminated against lessees who could not post bond to the extent of creating a total barrier to appeal.[87] The Court stated, "For them, as a practical

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[79] *Id.*

[80] *Id.* at 933-34.

[81] 405 U.S. 56 (1972).

[82] *Id.* at 76.

[83] *Id.*

[84] *Id.* at 59. The appellants-lessees refused to pay their rent until the appellee-landlord made certain repairs. The City Bureau of Buildings had previously declared the premises to be unfit for human habitation. The landlord threatened to "get a Court Order out on this matter" unless the appellants paid their rent. Before the landlord commenced suit, the appellants brought the declaratory judgment action. *Id.* at 58-60. Prior to invalidating the double bond requirement, the Court upheld the statute's provisions for a trial within six days of the complaint, *id.* at 64, and the limitation of triable issues, *id.* at 65-66.

[85] 405 U.S. at 78.

[86] *Id.* at 77. Oregon's general appeal bond statute requires that the appellant's bond amount include use and possession of the property; furthermore, the landlord can bring a separate suit for the accrued rent. For waste and damage by the lessee during the appeal, the landlord is protected by other statutory provisions. *Id.* at 77-78.

[87] *Id.* at 79.

matter, appeal is foreclosed, no matter how meritorious their case may be."[88]

The barrier to appeal created by section 11-3-23, unlike the *Lindsey* situation, is not a hurdle that, if not met prior to the appeal, completely bars appeal.[89] But section 11-3-23 does present a potential appellant with the risk of a penalty if the judgment is affirmed. That risk is one of the many costs of appeal an appellant must consider.[90] The possibility of having to pay an additional fifteen percent of the judgment is often as much an insurmountable barrier as a flat denial of an appeal. Therefore, section 11-3-23 "capriciously and arbitrarily" forecloses an appeal to those for whom the risk of the penalty is too high a cost.

In *O'Day v. George Arakelian Farms, Inc.*,[91] the Ninth Circuit Court of Appeals applied the reasoning in *Lindsey* to the double bond requirement of the Perishable Agricultural Commodities Act.[92] This bond differed from the bond required in *Lindsey* because on affirmance, the appellee collected only the amount of the original judgment.[93] The appellant in *O'Day* had been found liable but, because of his financial inability to post bond, he could not appeal.[94] The court, citing *Lindsey*, held that when a state does provide an appeal, the procedure

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[88] *Id.* The Court also noted that since the appellee was awarded the entire amount of the double bond on affirmance, the provisions amounted to "an automatic assessment of unproved damages." *Id.* at 78.

[89] The statute in *Lindsey* required the appellant to post bond as an absolute prerequisite to appeal. *Id.* at 77.

[90] *See* Meek v. Alexander, 137 Miss. 117, 121, 102 So. 69, 70 (1924).

[91] 536 F.2d 856 (9th Cir. 1976).

[92] *Id.* at 859-61; *see* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (Supreme Court applies same reasoning to fifth and fourteenth amendment equal protection challenges). The Perishable Agricultural Commodities Act provides legal recourse to farmers and to growers of perishable goods when goods are damaged by unscrupulous brokers and dealers. A petition is filed with the Secretary of Agriculture, who, upon a finding of liability, orders the broker to pay the petitioner. The broker may either pay the judgment or appeal to federal district court. To appeal, the broker must post bond of double the amount of the judgment. If the broker fails to pay or to appeal, his license is suspended for two or three years. 536 F.2d at 857-58.

[93] 536 F.2d at 860 n.6.

[94] *Id.* at 858. The appellant had been found liable for $22,089.80. Therefore, to appeal, bond had to be posted in the amount of $44,173.60, plus $997 in costs. The appellant petitioned the district court, asserting that the bond should be waived for him because of his financial inability to post bond. *Id.; cf.* Myron v. Chicoine, 678 F.2d 727, 729 (7th Cir. 1982) (appellant challenged double bond requirement of Commodities Exchange Act after appeal was perfected by posting bond; court dismissed action for lack of standing because appellant failed to allege and prove any injury by the double bond provision).

cannot be arbitrarily denied to some.[95] A state can impose penalties to deter frivolous or insubstantial appeals and to require security for protection of the original judgment.[96] To be upheld, the provision must be reasonably tailored and uniformly and nondiscriminatorily applied.[97] The *O'Day* court found that the double bond bore no reasonable relation to the prevention of frivolous appeals or appeals taken for delay.[98] Because the state did have a valid interest in advancing the statutory purpose, the court upheld the double bond requirement to the extent it approximated the potential damage to the appellee;[99] only to that extent was the double bond reasonably related to protecting the original judgment.[100]

Applying the logic of *Lindsey* and its progeny, the equal protection issues surrounding section 11-3-23 are obvious. The statute does not specify its purpose,[101] but case law indicates an intent to compensate the appellee for the costs of appeal.[102] The purpose of compensating the appellee is similar to that of protecting the appellee's award in *O'Day,* because a predetermined amount will accurately reflect the proper amount "only fortuitously if at all."[103] The court of appeals reasoned, "If the claim is small the product will be wholly inadequate; if

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[95] 536 F.2d at 859.

[96] *Id.*

[97] *Id.* at 860.

[98] *Id.* at 859-60. "It therefore arbitrarily denies appellant and similarly situated litigants the statutory right to appeal." *Id.* at 860. The court stated, "*Lindsey* expressly held that there is no rational relation between this admittedly legitimate purpose and a double bond requirement." *Id.*

[99] *Id.* The court held that automatically doubling the award bore no reasonable relation to any statutory purpose. *Id.* The court cited Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971), which upheld the double bond requirement of the Perishable Agricultural Commodities Act. *Id.* at 588. In *Chidsey,* however, the double bond, amounting to $1,920, imposed only a minor burden on the appellant and closely approximated the security required to protect the award. *Id.* In *O'Day,* the Ninth Circuit distinguished *Chidsey* on the basis of the reasonableness of the double bond requirement in advancing the statutory purpose. 536 F.2d at 861.

In Myron v. Chicoine, 678 F.2d 727 (7th Cir. 1982), the court dismissed an appellant's challenge of the double bond requirement of the Commodities Exchange Act. *Id.* at 729. The court followed the reasoning of *O'Day* by noting that "it may be that [the appellant] has posted an insufficient bond in this case and thus has actually benefitted from the provision it seeks to invalidate." *Id.*

[100] 536 F.2d at 860.

[101] See *supra* note 2 for the entire text of MISS. CODE ANN. § 11-3-23 (Supp. 1982).

[102] *See* Canal Bank and Trust Co. v. Brewer, 147 Miss. 885, 922, 114 So. 127, 128 (1927); *see also* Meek v. Alexander, 137 Miss. 117, 121, 102 So. 69, 70 (1924) (statute provides remuneration of expenses to successful appealing party).

[103] 536 F.2d at 860.

the claim is large, . . . it will be grossly excessive."[104] The *O'Day* court upheld the requirement of double bond only to the extent that it reflected the potential damage to the appellee.[105]

If the "conceivable basis" method of determining legislative purpose were used,[106] it is probable that the state would argue that section 11-3-23 was intended to deter appeals that are frivolous or that are taken for delay.[107] *Lindsey* and *O'Day* held that a fixed percentage of a judgment fails to relate reasonably to this purpose.[108] Therefore, it appears that a court, following *Lindsey* and *O'Day*, would find section 11-3-23 violative of the equal protection clause at least to the extent it fails to reflect the amount of costs incurred by the appellee.

Any equal protection violation could be remedied by allowing the court discretion in imposing the penalty and in determining its amount. Although a potential appellant would still face the possibility of this added cost, he would be penalized only to the extent that the appellee incurred costs.[109] Furthermore, the discretionary imposition of the penalty would enable the court to penalize a plaintiff who appeals a judgment for the defendant, a class that heretofore has not been subject to the penalty.[110]

B. Due Process

Although the due process clause of the Constitution does not provide a right to appeal, it does require "some form of hearing before an individual is finally deprived of a property interest."[111] An individual has a true property interest in his money; therefore, before section 11-3-23 works to deprive an unsuccessful appellant of his money,[112] the requirements of due process must be met.

The requirements of due process are flexible; they call "for such

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[104] *Id.*

[105] *Id.*

[106] *See supra* notes 63-65 and accompanying text.

[107] *See* Lowicki v. Lowicki, No. 53,598, slip. op. at 4 (Miss. Apr. 20, 1983) (statute appears to be intended to deter frivolous appeals). Similar statutes in other jurisdictions are intended to deter frivolous appeals and appeals taken for delay. *See supra* note 43.

[108] *See supra* notes 87-88, 96-98, and accompanying text.

[109] *See supra* notes 99-100 and accompanying text.

[110] *See supra* notes 39-40 and accompanying text.

[111] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[112] When a judgment for a dissatisfied plaintiff is affirmed on appeal, the end effect of the penalty is to reduce the amount the defendant-appellee must pay. *See supra* note 38 and accompanying text. The penalty does not reduce the judgment, so the dissatisfied plaintiff's property interest at issue is his money, not the judgment.

procedural protections as the particular situation demands."[113] In *Mathews v. Eldridge*,[114] a person receiving disability benefits was determined ineligible for future benefits.[115] The recipient alleged that because he had a property interest in receiving disability benefits,[116] due process required a hearing prior to termination.[117] The Supreme Court concluded that the receipt of disability benefits is a property interest and established a three-part test to determine what form of hearing is required for a particular deprivation. The Court held:

> [The test] requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[118]

In 1981, the United States Supreme Court expanded the scope of the applicability of the *Mathews* test beyond the prior hearing concept. In *Little v. Streeter*,[119] the Court held that a state must pay for blood tests for a defendant who is alleged to be the father of an illegitimate child.[120] In *Lassiter v. Department of Social Services*,[121] the Court

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[113] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979).

[114] 424 U.S. 319 (1976).

[115] *Id.* at 340.

[116] The interest of a recipient of disability benefits is an entitlement, a statutorily created property interest, rather than a true property interest. *Id.* at 332. This distinction is irrelevant, however, to the requirements of due process because both interests are equally protected by the fifth and fourteenth amendments. *Id.*

[117] *Id.* at 324-25.

[118] *Id.* at 335.

[119] 425 U.S. 1 (1981).

[120] *Id.* at 17. Streeter, an unmarried woman, had a child and, in compliance with public assistance regulations, identified Little as the father. The Connecticut Department of Social Services provided Streeter with an attorney to bring a paternity suit against Little. Little, through counsel, moved the court to order blood grouping tests on Streeter and the child. *Id.* at 3. Although Connecticut law provides that such tests are to be paid for by the moving party, Little argued that, because he was an indigent, the cost should be paid by the state. The court approved the tests, but denied the request that the state pay for them. The tests were not performed. *Id.* at 4. Under Connecticut law, Streeter's allegations of paternity created a prima facie case that Little was the father. The presumption could be rebutted by Little but only through testimony other than his own. *Id.* at 11. The court found Little to be the child's father and rendered judgment against him for "lying in expenses," "accrued maintenance," and costs and attorney fees.

found that the *Mathews* factors required a state to determine on a case-by-case basis whether legal counsel must be provided for a mother whose parental rights were being terminated.[122] The *Mathews* test is now applicable not only to the decision of what form of hearing is required, but also to other elements that affect the "fundamental fairness" of the hearing.[123]

1. Private Interest Affected

In determining the importance of the claimant's interest in disability benefits, the *Mathews* Court considered the effect of deprivation on the recipient.[124] Since retroactive relief was available if the beneficiary prevailed on appeal, his "sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim."[125] In *Lassiter,* the private interest was more substantial than in *Mathews* because in a termination proceeding the state seeks to end the parent's rights completely.[126] The *Mathews* Court further found that the deprivation would not have a substantial effect because the recipient's financial condition was irrelevant to the original granting of disability benefits and that during the deprivation period he might have been eligible for other sources of income.[127] The Court compared the effect of deprivation of disability benefits with the depri-

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Id. at 4.

[121] 452 U.S. 18 (1981).

[122] *Id.* at 31-32. The District Court of Durham County, North Carolina, transferred the custody of Lassiter's child to the Durham County Department of Social Services after finding him to be a neglected child. Lassiter was later convicted of second degree murder and sentenced to prison. *Id.* at 20. The Department of Social Services petitioned the court to terminate Lassiter's parental rights because she had made no effort to meet with the child, had refused to cooperate with the Department's efforts to improve her relationship with the child, and had made no plans for the child's future. Upon service of notice of the proceedings, Lassiter made no attempt to retain counsel and did not mention the hearing to the attorney who represented her in the criminal proceedings. *Id.* at 21. At the custody hearing, the court found that Lassiter's failure to obtain counsel was without just cause; the court did not appoint counsel because Lassiter did not allege that she was indigent. *Id.* at 22. After the hearing, in which Lassiter served as her own attorney, the court found that the violation of individual privacy involved in the termination of parental rights was not so unreasonable to require appointed counsel. *Id.* at 22-24.

[123] 452 U.S. at 24-25.

[124] 424 U.S. at 335.

[125] *Id.* at 340.

[126] 452 U.S. at 27.

[127] 424 U.S. at 342. "In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level." *Id.*

vation of welfare benefits in *Goldberg v. Kelly*.[128] In *Goldberg*, the Court held that due process requires a hearing before the termination of welfare benefits.[129] The crucial factor in *Goldberg* was that because welfare benefits were granted only to those in extreme financial conditions, the recipients depended on their benefits for survival.[130] Therefore, the *Mathews* Court concluded that although the effect of deprivation of disability benefits may be great, the "disabled worker's need is likely to be less than that of the welfare recipient"[131] in *Goldberg*. Finally, in *Little*[132] and *Lassiter*[133] the Court identified an interest in the accuracy and justice[134] of the determination that is shared by the individual and the state.

2. Procedures Used to Terminate Right

The *Mathews* Court next considered the "fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards.[135] A recipient's benefits are terminated upon a medical assessment that the recipient is no longer eligible.[136] The Court contrasted this "sharply focused and easily documented"[137] information with the variety of complex data that must be assessed to terminate a welfare recipient's benefits in *Goldberg*.[138] In *Little*, the Court considered not only the data used for assessment but also the availability of a reliable test to safeguard against an inaccurate decision.[139] In *Mathews*, the disability recipient's interest was further

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[128] 397 U.S. 254 (1970).

[129] *Id.* at 266-71.

[130] *Id.* at 264.

[131] 424 U.S. at 340.

[132] A court determination that Little was the father of Streeter's child would have also subjected him to child support payments and criminal liability if he failed to comply with the court-ordered payments. 452 U.S. at 13.

[133] In *Lassiter*, the Court noted that the parent-child relationship sought to be severed was a uniquely important individual interest. 452 U.S. at 27-28.

[134] *Id.* at 27; *Little*, 452 U.S. at 13.

[135] 424 U.S. at 343.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 343-44. To remain eligible for benefits the disabled worker must demonstrate that he is unable to be gainfully employed due to a "*medically determinable* physical or mental impairment." *Id.* at 343-44, *quoting* 42 U.S.C. § 423(d)(1)(A) (emphasis added by *Mathews* Court).

[139] 452 U.S. at 14. The Court noted that considering Connecticut's rule prohibiting testimony by the alleged father, "the usual absence of witnesses, [and] the self-interest coloring the testimony of the litigants," the risk of error was significant if blood tests were not available. *Id.* After an extensive review of the accuracy of blood tests, the Court

protected by the recipient's opportunity to review and to amend the agency's information supporting termination.[140] The Court also emphasized the protection provided by "the good-faith judgments of the individuals charged by Congress with the administration" of the program.[141]

3. The Public Interest

The *Mathews* Court reasoned that the public interest includes consideration of "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits."[142] In *Lassiter,* the Court found that the state's interest in minimizing costs was outweighed by its interest, shared with the individual, in "accuracy and justice."[143] The *Mathews* Court found the financial costs of providing a hearing and continuing benefits through the termination process to be substantial.[144]

In its ultimate decision, however, the *Mathews* Court noted, "Financial cost alone is not a controlling weight."[145] The disability benefits program met the requirements of due process, providing a procedure tailored to give everyone an opportunity to present their case in an effective manner.[146] In *Little,* the Court found that the requirements of due process were not met because the individual's interest was high in contrast to the slight burden that paying for the blood tests would impose on the state.[147] Although the *Lassiter* Court established a case-by-case analysis, it held that the state's failure to provide counsel did not make the case "fundamentally unfair."[148]

4. Section 11-3-23 and the *Mathews* Test

Section 11-3-23 falls far short of the due process requirements mandated by the *Mathews* test. First, although the appellant's interest

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found that the tests would greatly reduce the risk of error and advance the parties' interest in accuracy and justice. *Id.*

[140] 424 U.S. at 345-46.

[141] *Id.* at 349.

[142] *Id.* at 347.

[143] 452 U.S. at 28.

[144] 424 U.S. at 347.

[145] *Id.* at 348.

[146] *Id.* at 349.

[147] 452 U.S. at 16-17.

[148] 452 U.S. at 32-33.

in his property is not the equivalent of survival as in *Goldberg*,[149] the interest is much higher than that of the disability benefits recipient's in the uninterrupted receipt of benefits.[150] The effect of the application of section 11-3-23 is similar to that of the parental termination proceedings in *Lassiter*: the statute acts to permanently deprive the appellant of his property.[151] The appellant's deprivation is final, and he has no recourse through which to recover his property because the imposition of the penalty is mandatory.[152] If the imposition of the penalty were discretionary, the appellant could seek review of the decision through appeal.

Second, section 11-3-23 provides absolutely no safeguards to prevent wrongful deprivation of property. Although there is no evidence available to indicate the frivolity of the appeal or the injury to the appellee that is as reliable as the blood tests in *Little*,[153] section 11-3-23 fails to take advantage of material that is available to lessen the risk of error. The statute neither allows evidence to be presented by the parties nor requires a finding by the court that an appeal is indeed frivolous or that the appellee has incurred damage. Further, the "good faith judgment" that the *Mathews* Court found significant[154] is not present because the penalty is mandatory.

Third, allowing the court to exercise its discretion would pose only a slight administrative burden. All the information needed to make a decision on the appropriateness of penalizing the appellant is before the court during the appeal process—the trial record, the parties' briefs, and at oral argument, the parties' representatives. The court could easily examine this material and determine whether the appeal is frivolous or if the appellee had incurred compensable damage during the appeal. Because this material is so readily available, the state's pecuniary interest is surely outweighed by the interest it shares with the individual in an accurate and just decision.[155]

Conclusion

It is apparent that any constitutional infirmities of section 11-3-23

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[149] *See supra* notes 130-31 and accompanying text.

[150] *See supra* note 125 and accompanying text.

[151] *See supra* note 126 and accompanying text.

[152] *See supra* note 35.

[153] *See supra* note 139 and accompanying text.

[154] *See supra* note 141 and accompanying text.

[155] *See supra* notes 143 and accompanying text.

stem from its mandatory imposition of a fixed penalty.[156] The statute is in violation of the equal protection clause because it imposes a barrier to appeal that is not reasonably related to any conceivable or articulated statutory purpose.[157] The statute also fails to meet the requirements of due process because it creates a substantial and unnecessary risk by which an individual could be wrongfully deprived of a significant property interest.[158] Allowing the court to exercise its discretion in imposing an appropriate penalty would correct the constitutional violations. The court could impose damages reasonably related to the statutory purpose, and the risk of wrongful deprivation of an individual's property interest would be alleviated with minimal cost to the state. Furthermore, such a statutory change would enable the state to advance more effectively its interests in compensating the appellee and in deterring frivolous appeals and appeals taken for delay.

Susan Oliva McDonald

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[156] *See supra* notes 108-09, 151-54, and accompanying text.

[157] *See supra* notes 101-08 and accompanying text; *see also* notes 63-66 and accompanying text.

[158] *See supra* notes 149-55 and accompanying text.

PATERNAL INHERITANCE RIGHTS OF ILLEGITIMATES UNDER MISSISSIPPI LAW: GREATER THAN EQUAL PROTECTION?

Introduction

Illegitimate children have traditionally been denied almost all rights to inherit from either parent.[1] Although the common law rule was relaxed in the 1800's for maternal inheritance rights,[2] until recently an illegitimate child could inherit from the father only under limited circumstances.[3] Since the United States Supreme Court's decision in *Trimble v. Gordon*[4] in 1977, the paternal inheritance rights of illegitimates have been significantly expanded in almost all states.

This comment first addresses the constitutional requirements governing rights of illegitimates to inherit from their natural father.[5] Second, it analyzes section 91-1-15 of the Mississippi Code, as amended in 1981, in light of these constitutional requirements.[6] Third, this comment points out potential problems raised by the amended version of section 91-1-15.[7] Finally, it discusses the possibility that these amendments will unduly hinder the resolution of estates in Mississippi.[8]

I. Inheritance by Illegitimates: Background

Historically, illegitimates have had few rights of inheritance.[9] At

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[1] W. Blackstone, Commentaries on the Laws of England 485 (W. Kerr, London 1857), *cited in* H. Krause, Illegitimacy: Law and Social Policy 1-4, 25 (1971). The distinction between legitimate and illegitimate children originally developed from society's encouragement of stable, permanent relationships and from its desire that children be "born within institutional structures capable of raising them." *Id.* at 1. In addition, with the growth of Christianity, only monogamous relationships were acceptable and extramarital relationships were discouraged, thus, illegitimates became disreputable. *Id.* at 1-2.

[2] *See infra* notes 11-12 and accompanying text.

[3] *See infra* note 16 and accompanying text.

[4] 430 U.S. 762 (1977).

[5] *See infra* notes 18-43 and accompanying text.

[6] Miss. Code Ann. § 91-1-15 (Supp. 1982); *see infra* notes 50-55 and accompanying text.

[7] *See infra* notes 56-80 and accompanying text.

[8] *See infra* notes 56, 70-84 and accompanying text.

[9] 1 H. Krause, *supra* note 1, at 25. Blackstone stated:

common law this denial of inheritance rights for illegitimates was considered a necessary restriction, partly because of the child's uncertain paternity.[10] This rule remained unchanged until 1824 when in *Heath v. White*[11] an illegitimate was first allowed to inherit from his mother. The decision in *Heath* was based upon the closeness of the maternal relationship, which would not be altered by the child's illegitimate status.[12] Courts and legislatures have traditionally refused to expand the illegitimate's rights to include inheritance from the father[13] because the close relationship between mother and child was not thought to exist between father and child,[14] and because of the serious problems in proving paternity.[15] Eventually, statutes in many states were amended to allow the illegitimate to inherit from the father in certain situations;[16] but, until recently, no statutes provided illegitimates with full paternal inheritance rights.[17]

II. Constitutional Development of the Rights of Illegitimates

The first departure from the disparate treatment of illegitimates came in a 1968 decision by the United States Supreme Court, *Levy v.*

> The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.

Id. See generally Note, *Paternal Inheritance Rights of Illegitimate Children and the Problem of Proving Paternity*, 24 Wayne L. Rev. 1389, 1389-90 (1978).

[10] H. Krause, Illegitimacy: Law and Social Policy 25 (1971).

[11] 5 Conn. 228, 234-37 (1824). Since the decision in *Heath*, every state but Louisiana has passed intestate succession statutes allowing the illegitimate to inherit from his or her mother. *See* Note, *supra* note 9, at 1390.

[12] Note, *supra* note 9, at 1390.

[13] *Id.* at 1391.

[14] *Id.* at 1390-91. At common law, the mother was considered to be naturally responsible for an illegitimate child. This responsibility was not thought to be the father's. *Id.; see also* Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 Colum. L. Rev. 308, 310-16 (1930) (development of the Roman law concept that the illegitimate child is closely related to the mother's family).

[15] Note, *supra* note 9, at 1391.

[16] Note, *supra* note 9, at 1391. The most common situation in which paternal inheritance has been allowed is that of a marriage between the mother and father subsequent to the birth of the illegitimate child. *See, e.g.*, Miss. Code Ann. § 91-1-15 (1972). These amendments have resulted from the courts' recognition that to completely deny paternal inheritance rights to illegitimates was unfair. *See, e.g.*, Rudolph v. Rudolph, 556 S.W.2d 152, 155 (Ky. 1977).

[17] *See* Note, *supra* note 9, at 1391.

Louisiana.[18] In *Levy,* the Court struck down a Louisiana wrongful death statute[19] that permitted recovery by legitimate dependents only, finding that the statute violated the equal protection clause of the fourteenth amendment.[20]

Three years later in *Labine v. Vincent,*[21] the Court changed its position and upheld an intestate succession statute that discriminated against illegitimates by precluding paternal inheritance unless no other heirs existed.[22] The statute did not create an "insurmountable barrier" to inheritance by illegitimate children because the father could have legitimated the child by marrying the mother or could have included the child in a will.[23]

Subsequent decisions have required equal rights for illegitimate children in a number of contexts.[24] The most significant was *Trimble v.*

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[18] 391 U.S. 68 (1968).

[19] LA. CIV. CODE ANN. art. 2315 (West 1971).

[20] 391 U.S. at 72. The Court found illegitimacy irrelevant in evaluating the nature of the wrong involved, therefore classification on the basis of illegitimacy was not rationally related to the purpose of the wrongful death statute. *Id; see also* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), which involved an action by a mother for the wrongful death of her illegitimate son. The *Glona* Court, in analyzing the same statute involved in *Levy,* found the state's purpose of promoting legal family relationships insufficient justification for arbitrarily precluding recovery for the wrongful death of an illegitimate child. *Id.* at 75.

The North Dakota Supreme Court followed *Levy* in *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968), in which the court interpreted a statute that permitted inheritance by illegitimate brothers and sisters of the intestate only if the parents had married and the father had acknowledged the illegitimate children. *Id.* at 878-79; *see* N.D. CENT. CODE § 39.1-04-09 (1960 & Supp. 1977). *Jensen* involved an attempt by four illegitimates to inherit from a legitimate half-brother. 162 N.W.2d at 861-62. The court applied a "rationality" test and found that the statute violated the equal protection clause because there was no legitimate state interest to justify the statute's classification on the basis of legitimacy. *Id.* at 878-79. After finding the statute unconstitutional, the court permitted the four illegitimates to inherit. *Id.*

[21] 401 U.S. 532 (1971).

[22] *Id.* at 538-40. The intestate succession statute in *Labine* allowed acknowledged illegitimates to inherit from their father only if the father left no other descendents, ascendants, collateral relatives, or surviving wife, but allowed legitimate children a right of forced heirship in the father's estate. LA. CIV. CODE ANN. arts. 1486, 1493-95 (1952). Applying the *Levy* rationality test, the Court found the statute to be rationally related to the state's interest in encouraging family life and disposing of property left by an intestate; therefore, the Court upheld the statute. 401 U.S. at 536 n.6, 538-40.

[23] 401 U.S. at 539.

[24] In Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972), the Court reached the opposite result from that in *Labine* and declared a workmens' compensation statute unconstitutional. In *Weber,* the Court held that legitimate and unacknowledged illegitimate children dependent upon their fathers were equally entitled to workmens' compen-

Gordon.[25] *Trimble* involved an Illinois statute that permitted an illegitimate child to inherit from the mother under all circumstances and from the father only if the illegitimate's parents had later married and the father had acknowledged the child.[26] Although the illegitimate

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sation benefits. *Id.* at 169-70. The Court followed *Levy* and distinguished this case from *Labine* on the grounds that (1) the decedent in *Weber* could not have acknowledged the illegitimate, and (2) the state's interest in preserving the certainty of land titles was not at issue in *Weber*. *Id.* at 170-71.

Justice Powell expressed the Court's attitude toward statutes that discriminate against illegitimates:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Id. at 175-76.

A year after the *Weber* decision, in Gomez v. Perez, 409 U.S. 535 (1973), the Supreme Court declared unconstitutional a statute denying support payments to illegitimate children. *Id.* at 537-38. Applying a balancing test, the Court weighed the state's interests in avoiding problems of proof of paternity and preventing fraudulent claims against the right of the illegitimate child to equal protection. *Id.; see also* Note, *Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-Bag?*, 7 LOY. U. CHI. L.J. 754, 762 (1976) (extensive discussion of competing interests of state and child).

But, in Mathews v. Lucas, 427 U.S. 495 (1976), the Court upheld a section of the Social Security Act, 42 U.S.C. 402(d)(3) (1974), which presumed the dependency of legitimate children, but required that illegitimate children prove dependency upon the deceased father to collect social security benefits. 427 U.S. at 497-99. In *Lucas*, the Court found that the purpose of the provision was to maintain support of the child who had actually been dependent upon the father and who, by the father's death, had actually lost his or her means of support. *Id.* at 507. The distinction drawn by the statute was between those children who would or would not be likely to be dependent upon their fathers and not between legitimate and illegitimate children. *Id.*

[25] 430 U.S. 762 (1977).

[26] ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1973). This statute provided in pertinent part:

> An illegitimate child is heir of his mother and of any maternal ancestor and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate.

daughter's parents had never been married, a paternity decree had been entered during the father's lifetime requiring him to make weekly payments for the support of his daughter.[27] After the father's death, a probate court, pursuant to the Illinois statute, refused to allow the daughter to inherit from the father.[28] The Illinois Supreme Court upheld the constitutionality of the statute.[29]

On appeal to the United States Supreme Court, the majority applied an intermediate standard of review,[30] which was described as "not toothless."[31] The Court, citing *Mathews v. Lucas*,[32] required the

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Id. This statute was repealed in 1976. For the current Illinois statute, see ILL. ANN. STAT. ch. 110½, § 2-2 (Smith-Hurd Supp. 1982-1983).

[27] 430 U.S. at 764.

[28] *Id.*

[29] *Id.* The Illinois Supreme Court's decision was based on its earlier holding in *In re* Estate of Karas, 61 Ill. 2d 40, 329 N.E.2d 234 (1975), which had followed *Labine* in rejecting the equal protection argument. 329 N.E.2d at 240-42. The *Karas* court relied on the state's interest in promoting legitimate family relationships and disposing of property left by an intestate in upholding the statute. *Id.* The Illinois court also found that the statute did not place an "insurmountable barrier" on the child's ability to receive the father's property because the father could include the illegitimate in his will if he so chose. *Id.* at 240.

[30] 430 U.S. at 767. As a general rule, the Court has applied a strict scrutiny standard of review when a suspect class or a fundamental right is involved. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (any classification system penalizing exercise of constitutional rights is unconstitutional, unless necessary to promote compelling governmental interest). The Court usually has not chosen to treat "illegitimates" as a suspect class. *See* Mathews v. Lucas, 427 U.S. 495, 505-06 (1976) (comparison to suspect class of blacks). Instead, the standard of review has been somewhere between the strict scrutiny standard, the most restrictive, and the rational basis standard, the least restrictive. *See* Trimble v. Gordon, 430 U.S. at 767 (intermediate level of scrutiny applied); Mathews v. Lucas, 427 U.S. 495, 504-06 (1976) (same); Jimenez v. Weinberger, 417 U.S. 628, 631-34 (1974) (same); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172-73 (1972) (same). *But see* Labine v. Vincent, 401 U.S. 532, 535-40 (1971) (rational basis standard applied); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (same); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (same). For an explanation of the rational basis review standard, which is applied primarily to economic legislation, see McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

[31] 430 U.S. at 767 (citing Mathews v. Lucas, 427 U.S. 495, 510 (1976)). The Court, in *Trimble*, examined the effect of the statute on the two state interests relied upon by the Illinois Supreme Court in upholding the probate court's decision. 430 U.S. at 768-70. Although the Court recognized that "promotion of legitimate family relationships," was a valid state interest, it held that this interest did not justify discrimination against illegitimates. *Id.* at 769. Following *Weber*, 406 U.S. 164, 173, the Court found that trying to influence the conduct of parents by punishing their children was not reasonable and that the inheritance rights of their children would not be the basis of a couple's decision to marry or not to marry. *Id.* at 769-70.

The second state interest, establishing a "method of property disposition" for intes-

statute to be "carefully tuned to alternative considerations."[33] Applying this standard, the Court found that since neither the danger of a fraudulent claim nor a potential difficulty in proving paternity existed in this case, the state's interest in the accurate disposition of property could be protected by less restrictive means.[34] Thus, the Supreme Court found that the Illinois statute violated the equal protection clause.[35] The *Trimble* Court carefully limited its holding to statutes as restrictive as the Illinois statute.[36]

Since *Trimble v. Gordon,* other decisions concerning paternal in-

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tate decedents, was construed by the majority as an interest in preventing both spurious claims and problems in proving paternity. *Id.* at 771-72.

[32] 427 U.S. 495 (1976).

[33] 430 U.S. at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)).

[34] 430 U.S. at 772-73. Justice Powell stated, "Diffiiculties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." *Id.* at 772. The Court considered the paternity decree that had been entered while the father was alive and found "[t]hat adjudication should be equally sufficient to establish [the daughter's] right to claim a child's share of [the father's] estate." *Id.* at 772-73.

The *Trimble* Court also discussed whether the statute created an "insurmountable barrier" to inheritance by an illegitimate and whether it should be a determinative factor as in *Labine v. Vincent,* 401 U.S. at 539, in which the court found no insurmountable barrier when the father could have legitimated the child or left the property to the child by will. In *Trimble,* Justice Powell stated:

> By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the consitutionality of discrimination against illegitimates in a state intestate succession law . . . . Hard questions cannot be avoided by a hypothetical reshuffling of the facts.

430 U.S. at 774.

[35] 430 U.S. at 776. The *Trimble* Court did not accept the "presumed intent" theory of intestate succession. *Id.* at 774-76. This theory, fundamental to intestate succession law, postulates that if a decedent leaves no will, the intestate succession statutes should dispose of the property in the manner most likely chosen had a will been left. *See* 23 AM. JUR. 2D *Descent & Distribution* § 10 (1965). The *Trimble* Court found that this theory was only a part of the other two state interests involved, encouraging legitimate family relationships and establishing a method for disposing of the intestate's property, both of which had been found insufficient for statutory discrimination. 430 U.S. at 775-76; *see also* Note, *supra* note 9, at 1398-99 (discussing the Court's application of the presumed intent theory in *Trimble v. Gordon*).

[36] 430 U.S. at 772 n.14. The Court stated:

> Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.

Id.

heritance by illegitimates have been inconsistent. Exemplifying this inconsistency is *Lalli v. Lalli*,[37] in which the Court upheld a New York statute requiring entry of an order of filiation during the father's lifetime for an illegitimate to inherit upon the father's death.[38] The Court concluded that a state may require a particular form of proof of paternity during the father's lifetime[39] and also emphasized two important state interests, the efficient distribution of property and the avoidance of proof of paternity problems.[40]

Several conclusions may be drawn from recent United States Supreme Court decisions regarding the permissible scope of a statute affecting an illegitimate's right to inherit from the natural father. First, a statute may not require that the parents of the child marry as a prerequisite to inheritance.[41] Second, a state does have valid interests in promoting the efficient distribution of the intestate's property and in avoiding problems that might arise in proving paternity.[42] Finally, it appears that these two state interests, together with the state's interest in discouraging fraudulent claims, justify a statutory requirement of adjudication of paternity before the father's death.[43]

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[37] 439 U.S. 259 (1978).

[38] *Id.* at 175-76. The statute upheld in *Lalli* was N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967). The Court pointed out two differences between the New York statute and the one at issue in *Trimble*. First, the statute in *Trimble* required the illegitimate's parents to marry, 439 U.S. at 166, but the *Lalli* statute only required that a particular form of proof of paternity be obtained during the father's lifetime. *Id.* at 273. Second, the statute in *Lalli* was not based upon an attempt to encourage legitimate family relationships, *id.* at 267, as was the one in *Trimble*. *See supra* note 31.

The Supreme Court found that the New York Legislature passed the law for two purposes, the first being to promote the efficient distribution of the intestate's property. The majority reiterated its finding in *Trimble* that this was a valid state interest. 439 U.S. at 268. The second purpose was to eliminate difficult problems of proving paternity. *Id.* at 268-69. In addition, the Court noted the state's purpose of promoting the efficient administration of estates and reducing the number of fraudulent claims. *Id.* at 271-72.

In *Lalli*, however, the Court did not consider the requirement established in *Trimble* that a statute be "carefully tuned to alternative considerations." *See supra* note 33 and accompanying text.

[39] 439 U.S. at 273.

[40] *Id.* at 268-29.

[41] *See supra* note 31 and accompanying text. In this regard, punishing the illegitimate child is an impermissable method of regulating the conduct of the illegitimate's parents. *Id.*

[42] *See supra* notes 38-40 and accompanying text.

[43] *See supra* note 38 and accompanying text.

III. INHERITANCE BY ILLEGITIMATES IN MISSISSIPPI

Prior to 1981, Mississippi, like other states, permitted an illegitimate to inherit from the natural father only if the father married the mother and acknowledged the child according to section 91-1-15 of the Mississippi Code.[44] Otherwise, the illegitimate child could only inherit from the mother or the mother's kindred.[45] But, prior to 1981, if an adjudication of paternity was entered under the paternity provisions[46] of the Mississippi Code and if the illegitimate's father and mother could have legally consummated a marriage, a court could allow inheritance by the illegitimate from the father.[47]

Based upon the Supreme Court's decision in *Trimble v. Gordon*, a statute prohibiting inheritance by the illegitimate from the natural father obviously was a violation of the equal protection clause of the fourteenth amendment.[48] Because of *Trimble* and the Court's subsequent decision in *Lalli*, the equal protection clause requires that states permit inheritance from the father upon proper proof of paternity during the father's lifetime.[49]

In 1981, section 91-1-15 was amended by the Mississippi Legislature to remove the restriction that an illegitimate could only inherit from the mother.[50] The statute now permits the illegitimate to inherit from the natural father if (1) the father and mother participated in a

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[44] MISS. CODE ANN. § 91-1-15 (1972). This section allowed the child's status to change from illegitimate to legitimate by "virtue of such marriage and acknowledgement." As a result, the child could inherit as if he had been born legitimate. *Id.*

[45] *Id.* In Akers v. Johnson, 236 So. 2d 437 (Miss. 1970), the Mississippi Supreme Court stated, "Illegitimates are restricted to inheritance from the maternal side of their family by legislative enactment. No provision is made for inheritance from the father, the reasons for which we believe to be obvious." The court also held that "children of illegitimates," as the phrase was used in the statute, referred only to the legitimate children of illegitimates. *Id.* at 440.

Under Mississippi law prior to 1981, the children of an illegitimate were also limited to inheritance from the illegitimate's mother or her family, and legitimate heirs took to the total exclusion of illegitimate heirs in equal degree. MISS. CODE ANN. § 91-1-15 (1972). This limitation had the effect of excluding the illegitimate's illegitimate heirs from inheriting from the mother or her kindred if the illegitimate had legitimate heirs in equal degree. *1981 Mississippi Supreme Court Review*, 52 MISS. L.J. 481, 490 (1982).

[46] MISS. CODE ANN. §§ 93-9-1 to -49 (1972).

[47] *Id.* § 93-9-29(5) (1972). This particular subsection was later repealed. *See id.* § 93-9-29 (Supp. 1982).

[48] *See supra* notes 31-36 and accompanying text. ILL. REV. STAT. ch. 3, § 12 (Smith-Hurd 1973), which was declared unconstitutional in *Trimble*, was similar to MISS. CODE ANN. § 91-1-15(2) (1972). *See supra* note 26.

[49] *See supra* note 31-40 and accompanying text.

[50] MISS. CODE ANN. § 91-1-15 (Supp. 1982) (as amended).

marriage ceremony prior to the child's birth, even if the marriage was subsequently declared void, (2) a court had entered an adjudication of paternity or legitimacy before the death of the father, or (3) an adjudication of paternity was entered after the father's death.[51] The statute provides that an adjudication after the father's death must be based upon "clear and convincing" evidence, and the claim must be brought within one year from the date of the father's death or within ninety days from the first publication of notice to creditors, whichever comes first.[52] The amended statute also contains a three-year savings clause that allows an illegitimate whose intestate father died before July 1, 1981, to claim a share of the intestate's estate, provided the suit is filed before July 1, 1984.[53] The final provision of the amended statute removes earlier limitations on the right of the children of an illegitimate to inherit through him.[54] By permitting both complete maternal and paternal inheritance, qualified only by an adjudication of paternity before or after the intestate father's death, the amended version of section 91-1-15 exceeds current constitutional requirements.[55]

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[51] *Id.*

[52] *Id.* This period of time "shall run notwithstanding the minority of a child." *Id.* § 91-1-15(2)(c).

[53] *Id.* § 91-1-15(2)(d)(ii). *But see* Witt v. Mitchell, No. 53, 558, slip. op. at 8-9 (Miss. Mar. 30, 1983) (non-retroactive application of *Trimble v. Gordon* impliedly suggests that three-year savings clause in section 91-1-15 is limited to causes accruing after 1977). See *infra* notes 69-80 and accompanying text for a more thorough discussion of the three-year savings clause provided in section 91-1-15.

[54] MISS. CODE ANN. § 91-1-15(3) (Supp. 1982); *see supra* note 45. The present version of the statute treats the illegitimate's children as if the parent was legitimate, thus permitting inheritance from either side of the family and preventing the exclusion of these children in favor of a legitimate heir of equal degree of kinship. *1981 Mississippi Supreme Court Review, supra* note 45, at 492.

[55] *See* Lalli v. Lalli, 439 U.S. 259, 271-76 (1978) (entry of filiation order during lifetime of father essential for illegitimate to inherit from father); Trimble v. Gordon, 430 U.S. 762, 769-76 (1977) (more demanding, although not insurmountable, standard of proving paternity justified for illegitimates); Levy v. Louisiana, 391 U.S. 68, 69-72 (1968) (under equal protection clause, test for validity of classification on basis of illegitimatcy is whether classification is rational).

In *Trimble*, Justice Powell implied that had the statute permitted the illegitimate to inherit from the father by obtaining a prior adjudication or formal acknowledgement of paternity, it would have been constitutional. 430 U.S. at 772 n.14; *see also* Note, *Constitutional Law-Equal Protection and the Inheritance Rights of Illegitimates Under Intestate Succession Laws,* 43 MO. L. REV. 116, 122 (1978) (discussing the constitutional ramifications of *Trimble* for inheritance by illegitimates).

As noted above, the *Lalli* Court held that an intestate succession statute may constitutionally require a particular form of proof, such as an order of filiation entered before the father's death, as a condition to the illegitimate's paternal inheritance rights. *See*

IV. Potential Problems as a Result of the 1981 Amendment

The amended version of section 91-1-15 substantially expands the paternal inheritance rights of illegitimates. But this legislation may dramatically increase heirship and paternity suits, encourage fraudulent claims, and impair the stability of land titles passed through intestate succession.[56]

A. Proof of Paternity After Death of the Intestate

The new statute permits paternal inheritance rights to be established after the father's death.[57] The primary factors to be considered in evaluating such a provision are the illegitimate's right to equal treatment under the intestate succession laws and the public's interest in the efficient administration of intestate estates.[58]

The first factor, the illegitimate's right to equal treatment, has been given considerable weight during the past fifteen years. Even in *Trimble,* however, the most expansive decision by the Supreme Court, the holding was carefully tailored to allow states discretion to avoid problems in proving paternity by requiring certain forms of proof.[59] More recently, in *Lalli,* the Court upheld a statute that completely prohibited post-mortem proof of paternity to establish inheritance rights.[60]

By permitting paternity actions after the death of the father, the current version of section 91-1-15(2) affords the illegitimate a relatively high degree of protection.[61] This protection must be balanced against

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supra text accompanying notes 38, 39.

[56] *See infra* notes 63, 70-80 and accompanying text.

[57] Miss. Code Ann. § 91-1-15(2) (Supp. 1982); *See supra* text accompanying note 51. This provision is also provided in Unif. Probate Code § 2-109(2)(ii), 8 U.L.A. 328 (1972). Statutes identical or similar to section 2-109 have been adopted in a number of states. *See, e.g.,* Del. Code Ann. tit. 12, § 508 (1979); Me. Rev. Stat. Ann. tit. 18-A, § 2-109(2)(iii) (1980). *See generally* Note, *Illegitimate's Intestate Succession Rights In New York: Is Further Liberalization Forthcoming?,* 49 Fordham L. Rev. 379, 398 (1980).

[58] Note, *supra* note 9, at 1403.

[59] 430 U.S. at 772 n.14.

[60] 439 U.S. at 261-62, 275-76.

[61] The Mississippi statute limits the time within which a claim against the estate may be brought. *See supra* note 52 and accompanying text. Several other states that have adopted the Uniform Probate Code, or other post-mortem provisions, have not imposed a time limit, thereby affording even greater protection for the illegitimate. *See, e.g.,* Ill. Ann. Stat. ch. 110½, § 2-2 (Smith-Hurd Supp. 1982). Arkansas and Virginia, however, like Mississippi, have imposed time restrictions on post-mortem paternity suits. *See* Ark. Stat. Ann. § 61-141(d) (Supp. 1981) (action must be commenced or claim asserted within 180 days after the death of the father); Va. Code § 64.1-5.1(3) (1980) (affi-

the second factor, the need to efficiently administer intestate estates.

The second factor encompasses the need to prevent fraudulent estate claims, which was a major reason for the disparate treatment of illegitimate children under earlier intestate succession laws.[62] Permitting an adjudication of paternity after the intestate's death may encourage persons not related to the deceased to bring fraudulent paternity actions. Logically, if the alleged father is not present to rebut the claim, the potential for error is increased.[63]

Although the amended version of section 91-1-15(2) may carry an increased potential for fraudulent claims, the statute establishes a difficult burden of proof for post-mortem adjudication of paternity.[64] The danger of successful fraudulent claims is diminished by the "clear and convincing" standard of proof required of an illegitimate child claiming

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davit alleging parenthood must be filed within one year from date of intestate's death).

[62] *See* Note, *supra* note 57, at 386. Traditionally, differences between the maternal and paternal relationships made the mother naturally responsible for the illegitimate child. *See supra* note 14.

[63] It is this argument that would bring one to the conclusion that the proper method of protection would be to require that adjudication of paternity be entered during the intestate's lifetime. *See, e.g.,* IND. CODE ANN. § 29-1-2-7 (Burns 1972).

Another potential difficulty raised by this provision involves the operation of Mississippi's Dead Man Statute. MISS. CODE ANN. § 13-1-7 (1972). This statute provides that a person with a claim against a decedent's estate cannot testify to establish the claim, *id.*, because the decedent is unable to defend himself. This prohibition applies only to claims that "originated during the lifetime of such deceased person." *Id.* This type of statute can be found in most states and is generally regarded as a valuable procedural safeguard. The Dead Man Statute, however, only applies to exclude testimony by "a witness to establish his own claim." *Id.* Thus, in an action brought under section 91-1-15 to establish paternity after the death of the alleged father, the mother of the illegitimate probably would not be precluded from testifying on behalf of the illegitimate. *See* Rosetti v. Stein, 272 So. 2d 633, 634 (Miss. 1973) (witness disqualified only when he has a direct claim against the estate of the deceased because Dead Man Statute must be strictly construed in favor of witness' competency). Consequently, the Dead Man Statute seems to have a limited effect upon claims brought under section 91-1-15, thereby causing the loss of a useful safety device.

[64] MISS. CODE ANN. § 91-1-15(2)(c) (Supp. 1982) requires that adjudication be based upon "clear and convincing evidence." McCormick, in his treatise on evidence, states that when a party is required to prove a fact by clear and convincing evidence, the jury should be persuaded that the "truth of the contention is 'highly probable'." C. MCCORMICK, THE LAW OF EVIDENCE §§ 338-341 (2d ed. 1972 & Supp. 1978). "Clear and convincing" is not as restrictive as "beyond a reasonable doubt," but more so than a "preponderance of the evidence." *Id.* The clear and convincing standard of proof is also required by those states that have adopted provisions identical to section 2-109 of the Uniform Probate Code. *See supra* note 57. Some states permitting post-mortem proof of paternity, however, require only a "preponderance of the evidence." *See, e.g.,* DEL. CODE ANN. tit. 12, § 508(2)(b) (1979).

paternity after the alleged father's death.[65]

By permitting paternity to be proven after the alleged father's death, Mississippi joins the growing number of states that have adopted provisions similar or identical to section 2-109 of the Uniform Probate Code.[66] The amended Mississippi statute does not appear as open to spurious claims as statutes of other states because Mississippi requires proof by clear and convincing evidence and has a statute of limitations that expires one year from the date of death or ninety days from the first publication of notice to creditors.[67] The consequences of the legislature's addition of this provision will ultimately depend upon the courts' application of the "clear and convincing" standard to the established procedures for paternity actions presently in force.[68]

B. Retrospective Three-Year Savings Clause

As amended, section 91-1-15(2) permits an illegitimate whose intestate father died before July 1, 1981, to bring a paternity suit to establish heirship any time before July 1, 1984, and thereby claim a share of the father's estate.[69] Although this three-year period would clearly benefit the illegitimate whose claim might otherwise be barred, there are substantial arguments against the validity of this statutory provision.

A serious problem presented by this clause concerns the hindrance of administrative efficiency caused by an increasing number of unnec-

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[65] Note, *supra* note 57, at 398.

[66] *See supra* note 57.

[67] MISS. CODE ANN. § 91-1-15 (Supp. 1982).

[68] These statutory procedures are codified as the Mississippi Uniform Law on Paternity. MISS. CODE ANN. §§ 93-9-1 to -49 (1972 & Supp. 1982). The only method of proof specifically provided for by statute in Mississippi is proof by blood tests. MISS. CODE ANN. § 93-9-21 (1972). Although the usefulness of this type of proof would be seriously limited if not precluded in an action to establish paternity post-mortem, the Mississippi Uniform Law on Paternity does not specifically exclude other methods of proof. It has been held that circumstantial evidence is sufficient for an adjudication of paternity. *See* Hatfield v. Commonwealth, 180 Ky. 642, 203 S.W. 562, 562-63 (1918).

[69] MISS. CODE ANN. § 91-1-15(2)(d)(ii) (Supp. 1982). This provision was recently amended by the Mississippi Legislature to read:

> *A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981,* concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.

S.B. 2651 (March 16, 1983) (emphasis added). *See infra* note 90.

essary lawsuits that could impair land title stability and disturb settled estates.[70] *In re Estate of Kidd,*[71] a 1983 case, illustrates these possible complications. *Kidd* involved a suit by an illegitimate daughter against the estate of her alleged father.[72] The intestate father's death occurred in 1978, and the Mississippi Supreme Court considered whether, under section 91-1-15(2)(d)(ii), the plaintiff had until July 1, 1984, to bring an action to establish heirship and share in the decedent's estate.[73] The chancery court relied upon the supreme court's earlier decision in *Knight v. Moore*[74] and held that Mississippi's general six-year statute of limitations[75] applied.[76] Following *Knight,* the chancellor found that the statute of limitations began to run on the twenty-first birthday of the child and, thus, the plaintiff's cause of action was barred six years after her twenty-first birthday.[77]

On appeal, the Mississippi Supreme Court distinguished *Knight,* finding that *Kidd* was a petition to determine heirship, not a paternity proceeding, as in *Knight,* and that since a determination of heirship could not be made before the death of the alleged father, the plaintiff's cause of action did not accrue until that date. The court found that Mississippi's general six-year statute of limitations applied and that it began to run on the date of death, thereby permitting the plaintiff's claim to be brought under section 91-1-15(2).[78]

Obviously, had section 91-1-15(2) been amended to operate only

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[70] In Frakes v. Hunt, 266 Ark. 171, 583 S.W.2d 497, *cert. denied,* 444 U.S. 942 (1979), the Supreme Court of Arkansas held that if *Trimble v. Gordon* were applied retroactively, "chaotic conditions" would result from the impairment of title to real property. 583 S.W.2d at 499. The court also found that retroactive application could hinder real property improvement within the state. *Id.*

[71] No. 53,399, slip op. (Miss. May 4, 1983).

[72] *Id.,* slip op. at 1. The plaintiff filed a petition to determine heirship in the Chancery Court of Clay County and claimed to be the illegitimate child of Kidd, who died in 1978. The plaintiff contended that her mother had first informed her that she was the illegitimate child of the decedent when the plaintiff was approximately four years old. The chancellor found that the plaintiff's claim was barred by Mississippi's six-year statute of limitations and dismissed the petition. The plaintiff appealed to the Mississippi Supreme Court. *Id.*

[73] *Id.* at 2, 5.

[74] 396 So. 2d 31 (Miss. 1981). The court in *Knight* held that a 39 year-old woman who claimed to be the illegitimate daughter of a mental incompetent was barred by MISS. CODE ANN. § 15-1-49 (1972) six years after her twenty-first birthday. 396 So. 2d at 32, 34-35.

[75] MISS. CODE ANN. § 15-1-49 (1972).

[76] *Kidd,* slip. op. at 1-2.

[77] *Id.*

[78] *Id.* slip op. at 5.

prospectively,[79] the plaintiff's cause of action would have been governed strictly by the law in effect at the date of the intestate's death and the question of the applicability of section 91-1-15(2) would not have been litigated.[80]

CONCLUSION

The Mississippi statute on inheritance by illegitimates has clearly needed revision for a number of years.[81] Illegitimate children should not be treated unfairly or receive less consideration under intestate succession statutes. But such a statute must strike a careful balance between protecting the rights of the illegitimate under the equal protection clause and society's interest in the efficient administration of estates.[82] In the 1981 amendment to section 91-1-15, the Mississippi Legislature emphasized the rights of the illegitimate at the expense of

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[79] In his treatise on illegitimacy, Professor Krause states:

> Prospectively, a resonable regulation of procedures to ascertain paternity should delimit potential claimants at any early time. With regard to illegitimates born under earlier law, the constitutional mandate suggests that any cogent proof of descent be accepted. Legislatively, it would be simple to provide that estates that are closed will remain closed, with a similar rule being applied to trusts that have been distributed.

H. KRAUSE, *supra* note 10, at 93. Krause goes on to state that when the law of a state is changed to allow the illegitimate child to inherit from the father, the alteration should be allowed to "operate prospectively only and thus avoid the questions that would otherwise arise concerning the re-opening of estates long closed." *Id.* at 93-94.

[80] Although the decision in *Kidd* does not alleviate the serious potential for abuse from claims filed under section 91-1-15(2), in an earlier decision, Witt v. Mitchell, No. 53,558, slip op. (Miss. Mar. 30, 1983), the Mississipi Supreme Court made some progress toward averting possible abuses of section 91-1-15(2)(d)(ii). Although the court did not discuss the amended version of section 91-1-15, the *Mitchell* decision could have a significant effect on the operation of the statute. *Mitchell* pronounced that the broadened rights of inheritance gained by illegitimates under the 1977 Supreme Court decision, *Trimble v. Gordon*, should not be applied retroactively. *Mitchell,* slip. op. at 9.

The court based this ruling on the policy of discouraging instability in the administration of estates. *Id.* Refusing to apply *Trimble* retroactively creates an implication that claims brought under the three-year savings clause will be limited to causes of action accruing since April 26, 1977, the date of the *Trimble* decision. *Mitchell* appears to be an attempt to limit cases that potentially could be brought as a result of the legislature's recent changes in section 91-1-15. This limitation remains uncertain, however, until the supreme court establishes a more definite construction of the savings clause. It should be noted that the concerns of the potential flood of litigation resulting from this clause will naturally subside on July 1, 1984, when the provision becomes inoperative.

[81] *See supra* notes 44-48 and accompanying text.

[82] *See* Note, *supra* note 9, at 1403. *See also supra* text accompanying note 58.

society.[83]

To avoid potential problems that may develop[84] by permitting paternity and heirship to be proven post-mortem, two alternatives are possible. First, the legislature could conform the Mississippi statute to the statute upheld in *Lalli v. Lalli*.[85] By requiring paternity to be established before the father's death, the potential for fraudulent claims, excessive litigation, and unstable property titles caused by uninformed and one-sided post-mortem paternity judgments would be reduced or eliminated.[86] Second, if the present version of this provision is retained, Mississippi courts should rigidly enforce the "clear and convincing" standard of proof required by the statute.[87]

Finally, to permit claims that existed prior to July 1, 1981, to be litigated any time before July 1, 1984,[88] could not only cause severe difficulties in the administration of intestate estates in Mississippi but also could result in the disturbance of long-settled estates and property titles.[89] Judicial and administrative difficulties mandate that this provision be repealed so section 91-1-15 will operate prospectively only.[90]

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[83] *See supra* text accompanying notes 55, 61; *see also* notes 70-80 and accompanying text.

[84] *See supra* notes 56-80 and accompanying text.

[85] 439 U.S. 259, 275-76 (1978). *See* N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967). The New York statute upheld in *Lalli* required entry of an order of filiation during the father's lifetime as a prerequisite to inheritance by the illegitimate. *Id.*; *see supra* note 38 and accompanying text. In 1981 a provision was added to the New York law allowing an illegitimate child to inherit from the father if "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own." N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C) (McKinney 1981).

If legislative change is considered, the statute presently in effect in Indiana might serve as a useful model. *See* IND. CODE ANN. § 29-1-2-7 (Burns 1972).

[86] To avoid placing an unduly heavy burden on the illegitimate, such an amendment could include a provision permitting inheritance rights to be established through voluntary acknowledgement by the father. Provisions for inheritance through voluntary acknowledgement have been adopted by a number of states. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-274(b) (West 1981); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a) (McKinney 1981); N.C. GEN. STAT. § 29-19(2) (Supp. 1981).

[87] *See supra* note 68.

[88] *See* MISS. CODE ANN. § 91-1-15(2)(d)(ii) (Supp. 1982).

[89] *See supra* notes 70-80 and accompanying text.

[90] *See supra* notes 69, 70, 79, 80 and accompanying text. Recent legislation has further expanded the operation of this provision. On March 16, 1983, the Governor signed into law a bill passed by the legislature amending § 91-1-15(2) to provide that the remedy created by this clause "is separate, complete and distinct, but cumulative with the remedies afforded illegitimates as provided by the Mississippi Uniform Law on Paternity; provided however, the failure of an illegitimate to seek or obtain relief under the

Until such action is taken by the legislature, Mississippi courts will be faced with uncertainty in resolving claims to settled estates, such as the claim propounded in *Kidd*, and will also face a possible flood of litigation initiated by hopeful claimants attempting to beat the July 1, 1984, deadline.

William S. Mendenhall

Mississippi Uniform Law on Paternity shall not diminish or abate the remedy created herein." S.B. 2651, (March 16, 1983).

Moreover, in the preamble to this bill the legislature affirmed its intention that § 91-1-15 operate retrospectively:

> WHEREAS, the Legislature recognized at the time it was considering said amendment, that by creating said remedy the Legislature was opening the door to the possible litigation of stale or fraudulent claims and that a further effect of bestowing said remedy upon all illegitimates would possibly be to create a certain amount of confusion and uncertainty as to the status of titles to real property; however, the Legislature intended to bestow upon illegitimates a new and additional remedy whereby such illegitimates could maintain their rights of inheritance notwithstanding such interests of the state in preventing stale and fraudulent claims and avoiding uncertainty as to the titles of real property and, accordingly, the Legislature enacted appropriate periods of limitation within which illegitimates could bring their claims.

CONSTITUTIONAL PROBLEMS CONCERNING CERTAIN AGGRAVATING CIRCUMSTANCES USED FOR CAPITAL MURDER SENTENCING IN MISSISSIPPI

I. An Introduction to Death Sentencing

During the past decade, legislatures of many states, including Mississippi, have enacted statutes providing for the sentencing to death of persons convicted of certain homicides.[1] The goal of these statutes has sometimes been thwarted by meritorious constitutional challenges to the statutes on both state[2] and federal grounds.[3] The Mississippi Leg-

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[1] Mississippi's experience in enacting death penalty statutes is chronicled in Jackson v. State, 337 So. 2d 1242, 1250-56 (Miss. 1976). *See infra* note 4. In 1977, Mississippi supplanted the *Jackson* scheme with Miss. Code Ann. § 99-19-101 (Supp. 1982). *See infra* note 64 (description of specific homicides susceptible to captial punishment).

[2] The California Supreme Court, in People v. Superior Court, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982), relied in part upon the due process clause of the state constitution, Cal. Const. art. I, §§ 7(a), 15, to invalidate one of the aggravating circumstances contained in California's death penalty scheme. 647 P.2d at 81, 183 Cal. Rptr. at 805.

[3] Most challenges, whether successful or unsuccessful, rely upon guarantees provided in the eighth and fourteenth amendments to the United States Constitution. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 423 (1980); Proffitt v. Florida, 428 U.S. 242, 247 (1976); Gregg v. Georgia, 428 U.S. 153, 158 (1976); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

Occasionally, the fifth and fourteenth amendments to the United States Constitution provide the basis for challenge. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 432 (1981) (reliance on double jeopardy clause). Other cases, expressly relying on the eighth and fourteenth amendments, are susceptible to being grounded in the fifth and fourteenth amendment due process guarantees, although the Supreme Court has never expressly relied upon these guarantees. *See, e.g.*, Enmund v. Florida, 102 S. Ct. 3368, 3379 (1982) (death sentence cannot be imposed without finding of individual culpability); Eddings v. Ohio, 455 U.S. 104, 105 (1982) (sentencing proceeding that limits the mitigating factors to be considered is unconstitutional); Lockett v. Ohio, 438 U.S. 586, 606 (1978) (statute limiting the mitigating factors to be considered is unconstitutional). *Cf.* Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (due process requirements correlate with eighth amendment guarantees).

The independent usefulness of the due process grounds was a main issue in People v. Superior Court, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). In *Superior Court*, the California Supreme Court distinguished the holding in Proffitt v. Florida, 428 U.S. 242 (1976), which was limited to eighth and fourteenth amendment grounds, from an analysis based solely on due process. This alternate analysis provided one basis for

islature, in its attempt to formulate a statute that is not constitutionally infirm, has received yeoman support from the Mississippi Supreme Court.[4] "[A]n eye for an eye, a tooth for a tooth, and a life for a life will not pass constitutional muster"[5] is perhaps the quintessential statement of the problem facing those who would impose the death penalty.[6]

Some states, when enacting their initial statutes, left discretion over whether the death penalty should be inflicted to the unguided province of the jury.[7] Statutes permitting unbridled juror discretion were held to lead to arbitrary and capricious imposition of this penalty and were thus constitutionally unacceptable.[8] Some legislatures then turned to the logical inverse of this unbridled discretion and made the death penalty mandatory for certain offenses.[9] This approach also resulted in an arbitrary and capricious application of the death penalty[10]

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the opposite holdings in *Superior Court* and *Proffitt*. 647 P.2d at 79-80, 183 Cal. Rptr. at 803-05. The California Supreme Court simultaneously based its holding on independent state grounds. *See supra* note 2.

[4] In Jackson v. State, 337 So. 2d 1242, 1251-56 (Miss. 1976), faced with the clearly unconstitutional language of the applicable capital punishment statutes, the Mississippi Supreme Court essentially rewrote the statutes in an attempt to provide Mississippi with a death penalty sentencing scheme that could survive a constitutional challenge.

[5] State v. Monroe, 397 So. 2d 1258, 1271 (La. 1981).

[6] It is not the intent of this comment to discuss the morality, or efficacy, of the death penalty. There is, no doubt, much to be said on these issues, but it is only the constitutionality of the death penalty sentencing schemes that is the focus here. Issues tangential to this consideration of constitutionality will not be addressed.

[7] *See, e.g.*, GA. CODE ANN. § 26-1005 (Supp. 1971); *id.* § 26-1302; TEX. PENAL CODE art. 1189 (1961). These statutes were held to violate the eighth and fourteenth amendments in Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

[8] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 285 (1976); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam); *see also* Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (jury guidance must be sufficient to actually channel juror deliberation).

[9] *See, e.g.*, N.C. GEN. STAT. § 14-17 (1974) (mandatory death penalty for first degree murder); *cf.* Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (expressly reserving question regarding constitutionality of mandatory death penalty).

[10] "Arbitrary and capricious" is the nomenclature ordinarily used to describe indiscriminate sentencing that is constitutionally improper. Occasionally, however, "wanton and freakish" is used to characterize such improper sentencing. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 207 (1976) (prohibiting wanton and freakish imposition of death penalty); *In re* Jordan, 390 So. 2d 584, 588 (Miss. 1980) (same); Irving v. State, 361 So. 2d 1360, 1367, 1371 (Miss. 1978) (same). This latter characterization is a more evocative description of the injustice of this sentencing but at the same time may appear to necessitate a higher requirement of outrageousness than the former language. Because the use of "wanton and freakish" may intensify any emotional involvement in an already too emotionally-charged subject, it is less appropriate for an objective evaluation of the constitutional issues at stake than the more neutral "arbitrary and capricious" language.

and eventually was ruled unconstitutional.[11]

It has been deemed to be of paramount constitutional importance that any acceptable death-sentencing scheme must provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' "[12] It has become increasingly apparent that it is difficult to draft a constitutionally acceptable death-sentencing procedure.[13] The deference the Supreme Court exhibits when reviewing constitutional challenges to death-sentencing statutes is derived, in part, from a desire to monitor the acceptability of the death penalty among American citizens in general.[14] Justices Brennan and Marshall would further heighten this deference because they find the death penalty to be cruel and unusual punishment, and therefore violative of the eighth and fourteenth amendments, in all cases.[15] Although the other Justices are not opposed to such punishment in the manner of Justices Brennan and Marshall, there is a general recognition that "death as a punishment is unique in its severity and irrevocability"[16] requiring extraordinary safeguards to be taken when considered as a sentencing alternative.[17]

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[11] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[12] Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (quoting Justice White's concurrence in Furman v. Georgia, 408 U.S. 238, 313 (1972)).

[13] *See, e.g.*, Enmund v. Florida, 102 S.Ct. 3368, 3370 (1982) (vacating death penalty when statute allowed its imposition despite lack of individual culpability); Eddings v. Ohio, 455 U.S. 104, 113-15 (1982) (vacating death penalty when statute did not define mitigating circumstance and judge would not consider defendant's background); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (death penalty invalidated when statute limited what could be a mitigating circumstance); People v. Superior Court, 31 Cal. 3d 797, 647 P.2d 76, 81, 183 Cal. Rptr. 800, 805 (1982) (holding unconstitutional the language of a statutory aggravating circumstance); Arnold v. State, 236 Ga. 534, 224 S.E.2d 386, 392 (1976) (same).

[14] *See* Enmund v. Florida, 102 S.Ct. 3368, 3372-76 (1982) (analysis of statistics regarding the acceptability of death penalty to legislatures and citizenry); Gregg v. Georgia, 428 U.S. 153, 181-82 (1976) (reference to community values and evolving standards).

[15] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976) (Brennan, Marshall, J.J., dissenting). Justices Marshall and Brennan also appear to have a standard dissent to all denials of certiorari in death penalty cases. *See, e.g.*, Briley v. Virginia, 451 U.S. 1031, 1031 (1981) (Brennan, Marshall, J.J., dissenting).

[16] Gregg v. Georgia, 428 U.S. 153, 187 (1976); *see* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (death penalty differs in kind, not in degree); *see also* Eddings v. Ohio, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) (death sentences are "qualitatively different" from prison sentences).

[17] One representative illustration of the procedural particularities in death penalty cases is the juror exclusion rule enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968), and modified for bifurcated trial conditions in Adams v. Texas, 448 U.S. 38 (1980). Originally, the *Witherspoon* decision invalidated a state statute that allowed ju-

Faced with the strictures that result from constitutional considerations, Mississippi has developed a capital sentencing scheme similar[18]

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ror excusal for cause if the prospective venireman expressed having "scruples" against the death penalty. Such improper excusal was held to require reversal of the conviction. Proper excusal for cause must be based upon opposition to the death penalty so vehement as to render the juror unable to follow the law and his duty as a good citizen. 391 U.S. at 518-23. The holding in *Witherspoon* was further elaborated in *Adams*, which held that excusal for cause must be based upon opposition to the death penalty so vehement as to make impartial findings of fact impossible or a vote against the death penalty, regardless of the proof, a virtual certainty, or both. Excusal that does not meet these standards was held to necessitate vacation of the death sentence. 448 U.S. at 40, 48-50. The current Fifth Circuit construction of what language constitutes unequivocal opposition to the death penalty is indicated in Williams v. Maggio, 679 F.2d 381, 383-86 (5th Cir. 1982); Alderman v. Austin, 498 F. Supp. 1134, 1136 (S.D. Ga. 1980), *aff'd*, 663 F.2d 558 (5th Cir. 1981); Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), *aff'd on rehearing*, 626 F.2d 396, 397-98 (5th Cir. 1980); *see* Hance v. Zant, 696 F.2d 940, 954-56 (11th Cir. 1983).

[18] This is not to say there is a universal or univocal scheme; there is variance between states with respect to specific procedures. For example, it is the norm, not the exception, for definitions of what constitutes a capital offense to differ from state to state. *See, e.g.*, ALA. CODE § 13A-5-40 (1982) (killing in any of 14 specified contexts); CAL. PENAL CODE §§ 189-190 (West Supp. 1982) (premeditated killing or killing during any of 6 specified felonies); FLA. STAT. ANN. § 782.04 (West 1983) (premeditated killing or killing during any of 9 specified felonies or as the result of illegal drug distribution); GA. CODE ANN. § 16-5-1 (1982) (premeditated killing or killing during non-specified felony); LA. REV. STAT. ANN. § 14:30 (West Supp. 1982) (premeditated killing during any of 7 specified felonies or within 3 specified contexts); MD. ANN. CODE art. 27, § 407-410 (1982) (premeditated killing or killing during any of 9 specified felonies or within 2 specified contexts); MISS. CODE ANN. § 97-3-19 (Supp. 1982) (killing in any of 5 specified contexts or during any of 5 specified felonies); TEX. PENAL CODE ANN. § 19.01 (Vernon 1974) (premeditated killing during any of 4 specified felonies or within any of 4 specified contexts). It is also usual for the specific enumeration of aggravating and mitigating circumstances to vary. *See, e.g.*, ALA. CODE § 13A-5-49, -51, -52 (1982) (8 aggravating and 7 mitigating circumstances); CAL. PENAL CODE § 190.2-3 (West Supp. 1982) (19 aggravating and 11 mitigating circumstances); FLA. STAT. ANN. § 921.141 (West Supp. 1982) (9 aggravating and 7 mitigating circumstances); GA. CODE ANN. § 17-10-30 (1982) (10 aggravating and no mitigating circumstances); LA. CODE CRIM. PROC. ANN. arts. 905.4, .5 (West Supp. 1982) (9 aggravating and 8 mitigating circumstances); MD. ANN. CODE art. 27, § 413 (1982) (10 aggravating and 8 mitigating circumstances); MISS. CODE ANN. § 99-19-101 (Supp. 1982) (8 aggravating and 7 mitigating circumstances); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1982) (3 questions specified to be asked jury so as to reveal the aggravating or mitigating character of situation).

Some states leave the decision of sentencing in the hands of a guided jury. Others relegate jury findings to the status of an advisory verdict, reserving the actual decision on sentence for the trial judge. *See, e.g.*, ALA. CODE § 13A-5-46 (1982) (advisory verdict); FLA. STAT. ANN. § 921.141 (West Supp. 1982) (same). Additionally, other special factors are sometimes included in sentencing schemes. *See, e.g.*, ALA. CODE § 13A-5-54 (1975) (only counsel with five or more years experience may be appointed for indigent defen-

to that of several other states.[19] Mississippi's scheme mandates a bifurcated trial.[20] The first stage of the bifurcated trial is a guilt/innocence hearing during which the factual question of the defendant's participation in the crime is determined.[21] If the defendant is found guilty at the first hearing, a sentencing hearing will follow in which a choice is made between sentencing the defendant to life in prison or to execution.[22] During the sentencing hearing, the prosecution puts on proof of specific, statutorily defined aggravating circumstances surrounding the crime of which the defendant stands convicted.[23] The defense, in turn, offers proof of any factors about the defendant that could be viewed as mitigating circumstances to the crime. Some mitigating circumstances are indicated by statute,[24] but the defense is not limited by the statu-

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dants); CAL. PENAL CODE § 190.5 (West Supp. 1982) (exclusion of persons under age of 18 from death penalty).

[19] *See generally* Enmund v. Florida, 102 S.Ct. 3368, 3372-75 n.5-15 (1982) (review of the general scope of capital punishment statutes in the United States).

[20] MISS. CODE ANN. § 99-19-101(1) (Supp. 1982).

[21] *Id.*

[22] *Id.* § 97-3-21.

[23] These statutory aggravating circumstances are set forth in *id.* § 99-19-101(5) (Supp. 1982):

(5) Aggravating circumstances shall be limited to the following:
(a) The capital offense was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.
(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital offense was committed for pecuniary gain.
(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital offense was especially heinous, atrocious or cruel.

[24] The statutory mitigating circumstances are set forth in *id.* § 99-19-101(6):

(6) Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital offense committed by an-

tory listing.[25] The jury is then instructed that it must weigh the aggravating and mitigating factors against each other in determining what sentence to pronounce upon the defendant.[26] The aim of this sentencing proceeding is that the "jury should be given guidance in its decision making"[27] to reduce the likelihood that the imposition of the death sentence would be arbitrary or capricious.[28]

The evolution of a constitutional death-sentencing statute for Missiissippi remains an on-going process. The constitutionality of many

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other person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

[25] *See* Eddings v. Ohio, 455 U.S. 104, 110-11 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

[26] MISS. CODE ANN. § 99-19-101(2) (Supp. 1982). If the death penalty is to be imposed, the jury must make written findings of the aggravating circumstances that were determined to exist. *Id.* § 99-19-101(3). This written finding is minimally useful in channeling and guiding the jury's discretion. Statutes of other states provide much greater direction. In Maryland, for instance, the jury is required to commit to paper not only the aggravating circumstances found, but the mitigating circumstances, and an explanation of how the weighing was done. MD. ANN. CODE art. 27, § 413(j) (1982); *see* Johnson v. State, 292 Md. 405, 439 A.2d 542, 561 (1981). Furthermore, Maryland clearly stipulates that aggravating circumstances must be proved beyond a reasonable doubt, but mitigating circumstances need only be shown by a preponderance of the evidence. MD. ANN. CODE art. 27, § 413(d), (g) (1982); *cf.* ALA. CODE. § 13A-5-45(e), (g) (1982) (burden of proof requirements delineated); *id.* § 13A-5-48 (weighing does not mean tallying); TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 1981 & Supp. 1982) (sentencing findings against defendant must be beyond a reasonable doubt). *See infra* note 90.

In Mississippi, jury instructions that carefully follow the statutory language will tell the jury no more than the following:

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

MISS. CODE ANN. § 99-19-101(3) (Supp. 1982). Without even speculating on what an optimum, or even a constitutional minimum, actually would be in these jury instructions, it is submitted that the Mississippi statute falls woefully short in its purpose of guiding the jury. *Cf.* Coleman v. State, 378 So. 2d 640, 646 (Miss. 1979) (absence of proper burden of proof directions revealed).

[27] Gregg v. Georgia, 428 U.S. 153, 193 (1976); *see* Spivey v. Zant, 661 F.2d 464, 469-71 (5th Cir. 1981) (jury must receive clear instructions).

[28] Gregg v. Georgia, 428 U.S. 153, 194 (1976).

components of the Mississippi statute have never been thoroughly examined.[29] In particular, two of the statutory aggravating circumstances enumerated in section 99-19-101(5) of the Mississippi Code—(d) and (h)[30]—appear vulnerable to constitutional attack.[31] Before analyzing the constitutional infirmities of these statutory aggravating circumstances, it is useful first to delineate the new procedural obstacles to review of constitutional issues[32] and then to survey the overall context of the homicide statutes that exist in Mississippi.[33]

II. Difficulties in Obtaining Federal Review

Death-penalty statutes regularly survive scrutiny by the state courts, only to be struck down later on federal review.[34] As a practical matter, the most promising forum in which to challenge the constitutionality of a statutory provision is usually a federal court during

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[29] Like most other states, Mississippi statutorily mandates comparative review by the state supreme court of all death penalties. *See* Miss. Code Ann. § 99-19-105 (Supp. 1982). The purpose of such review is to provide a final constitutional safeguard against imposition of the death sentence in an arbitrary or capricious manner. In particular, there must be review of whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases." *Id.* § 99-19-105(3)(c). This language has been interpreted to include comparisons with cases in which the death penalty was actually imposed but to exclude comparisons to capital murder convictions that resulted in only life sentences. Coleman v. State, 378 So. 2d 640, 647-48 (Miss. 1979). In practical terms, when a defendant who has been convicted of killing someone and has been given a death sentence is compared to defendants in other cases when someone has been killed and the death sentence has been imposed, no disparity is revealed. How could there be disparity in this sort of comparative system? Gross disparity is apparent, however, when the crime of one sentenced to die is compared with those who have received only life sentences. *See infra* text accompanying notes 127-47. The United States Supreme Court has noted that in these state review procedures "[g]enuinely independent review has been exceedingly rare." Godfrey v. Georgia, 446 U.S. 420, 441 (1980). In effect, such review is toothless.

[30] *See supra* note 23.

[31] *See infra* notes 92-168 and accompanying text.

[32] *See infra* notes 34-59 and accompanying text.

[33] *See infra* notes 60-91 and accompanying text.

[34] The simple fact that, to date, only the death sentence of Jimmy Lee Gray, *see* Gray v. Lucas, 677 F.2d 1086, 1111 (5th Cir. 1982), has survived federal scrutiny through the Fifth Circuit indicates that most cases contain errors that the Mississippi Supreme Court does not recognize. Such errors, however, are valid grounds for reversal or vacation of sentence. One can speculate that this apparent reticence by the Mississippi Supreme Court to recognize the merit of death penalty appeals may not be so much a function of the court's lack of sensitivity, but rather the result of the political pressure the justices are subject to because they are elected officials. *See* Miss. Const. art. VI, § 145A (supreme court justices to be elected).

habeas corpus proceedings.[35] Given the desirability of federal review, it is somewhat unsettling that the United States Supreme Court has recently made rulings that can drastically curtail the scope of federal review[36] by placing stringent requirements for exhaustion of state remedies and error preservation requirements on all petitioners seeking federal review of state court decisions.[37]

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[35] *See* 28 U.S.C. § 2254 (1977). Justice Marshall has stated that evidence suggests state "appellate courts are incapable of guaranteeing the kind of objectivity and even-handedness" the Court contemplates. Godfrey v. Georgia, 446 U.S. 420, 439 (1980) (Marshall, J., concurring). Although this observation may be true as a general rule, there are exceptions. For example, the Mississippi Supreme Court, in Jackson v. State, 337 So. 2d 1242, 1255 (Miss. 1976), invalidated a provision of MISS. CODE ANN. § 99-17-20 (Supp. 1975) that prohibited the granting of instructions as to lesser included offenses, which was similar to the statute held unconstitutional in Beck v. Alabama, 447 U.S. 625 (1980); *see also id.* at 635 n.10 (noting Mississippi court's action).

[36] *See infra* notes 38, 43-45, and accompanying text (decisions reducing scope of federal review).

[37] The concept of exhaustion of state remedies is closely related to that of preservation of error. It is important, however, to keep these notions distinct, as they can easily be confused. To achieve exhaustion, a habeas corpus petitioner must raise before the state courts all claims that are later to be raised in federal court. Rose v. Lundy, 455 U.S. 509, 515-17 (1982). This practice is based upon principles of comity; state appellate courts ought to be allowed a chance to correct any errors by the lower state courts before the federal courts intervene. *Id.* at 514. If such assignments of error are not presented to the state courts, they must be dismissed when raised in the federal forum. *Id.* at 510. A similar respect for the prerogative of state courts is manifested in the error preservation requirement. This doctrine, in a practical nutshell, states that errors at trial must be objected to at trial, *see, e.g.*, MISS. SUP. CT. R. 42 (assignment of error based on giving instructions to jury not considered on appeal unless objected to at trial), raised on direct appeal to the state appellate court, *see, e.g.*, MISS. CODE ANN. § 99-19-105 (Supp. 1982) (mandatory review of death penalties), and again raised in any state collateral proceeding, *see, e.g.*, MISS. CODE ANN. § 99-35-145 (1972) (petition for writ of error corum nobis). An attorney must make objection to an error at its inception and then complain of the error constantly thereafter at all levels of appeal. If an attorney does not commence an objection in a timely manner, or ceases to complain of the error during any level of appeal, the state courts may invoke their error preservation rules. These rules will act as a *procedural bar* to *preclude* the subsequent raising of any such late or abandoned claim of error. Engle v. Isaac, 456 U.S. 107, 125 (1982). Only the state courts, and not the state attorney general's offices, can invoke these preclusionary rules. Only if a state court has relied upon preclusion itself can that state's attorney general properly urge that an assignment of error be precluded from federal review. *See id.* at 128-29 (comity protects state court's prerogatives). It is, of course, within a state court's purview *not* to invoke its preclusionary rules if it decides that considerations of justice and fairness warrant hearing precludable claims of error.

If a petitioner fails to preserve error, he is deemed to have "waived" his right to that claim for relief. It is possible, however, to have this defect cured. A waiver of this failure to preserve error (waiver of waiver) may be inferred if the Attorney General does not object to the raising of an assignment of error that could be barred from consideration.

Id. at 124-25 n.26.

Whether a failure to exhaust state remedies may be waived by the Attorney General is a difficult issue. The Fifth Circuit, in Felder v. Estelle, 693 F.2d 549, 554 (5th Cir. 1982), expressly held exhaustion requirements may be waived. The court made this rule while acknowledging contrary rules in the First, Second, Third, and Ninth Circuits. *Id.* at 551. The Sixth and Tenth Circuits have recently adopted this majority view that exhaustion cannot be waived. *See* Bowen v. Tennessee, 698 F.2d 241, 243 (6th Cir. 1983) (en banc); Narango v. Ricketts, 696 F.2d 83, 86-87 (10th Cir. 1982). Previously, only the Fourth Circuit had adopted the rule enunciated by the Fifth Circuit in *Felder. See* Jenkins v. Fitzberger, 1440 F.2d 1188, 1189 (4th Cir. 1971), *quoted in Felder,* 693 F.2d at 551-52.

Anderson v. Harless, 103 S. Ct. 276, 277 (1982), provides a fair indication of how the United States Supreme Court will resolve this conflict in circuits. *Harless,* without expressly stating, overruled the *Galtieri* exception that allowed exhaustion requirements to be overlooked once a district court had found such requirements satisfied and had reached the merits. Burns v. Estelle, 695 F.2d 847, 849-50 (5th Cir. 1983). *See generally* Galtieri v. Wainwright, 582 F.2d 348, 364 (5th Cir. 1978) (introducing "*Galtieri* exception").

In *Harless,* both the district and circuit courts had reached the merits, but the Supreme Court vacated the relief those courts had granted and dismissed Harless' claim for failure to "fairly present" claims so that they were identified as federal constitutional claims to the state courts. 103 S.Ct. at 278; *see* Duckworth v. Serrano, 454 U.S. 1, 5 (1981). This absolute deference for comity with the state courts would indicate that the Attorney General—a mere partisan litigant in the civil habeas corpus proceeding—has no power to usurp the state courts' prerogative. The state court, respect for whose decision is the basis of comity, is not a party to the habeas corpus proceeding, and neither of the actual parties have authority to speak for the court. For better or worse, it would appear that exhaustion will be deemed to be unwaivable, though exhaustion is clearly waivable in the Fifth Circuit until such a determination is made by the Supreme Court.

The Fifth Circuit's rationale in the *Felder* majority opinion is founded upon the assumption that exhaustion is not a subject-matter jurisdictional prerequisite; therefore, when the interests of judicial efficiency so dictate, exhaustion is waivable. 693 F.2d at 551; *accord Narango v. Ricketts,* 696 F.2d at 86 (exhaustion requirement is a matter of comity, not jurisdiction). The majority opinion holds that exhaustion can be waived, not because the Attorney General has authority to speak for the state court, but rather because once a federal court has determined the exhaustion requirement has been satisfied there is no affront to state court prerogatives. Even if a higher court, using a more stringent scrutiny, subsequently determines a claim not to be exhausted, the state court's prerogative has still been preserved because the claim was at least "arguably" exhausted. This would appear to be sound jurisprudence, capable of withstanding certiorari review, were it not for the Supreme Court's effort to strictly enforce exhaustion requirements. *See infra* note 39.

The concurrence in *Felder* is based upon a thoroughly erroneous notion of what interests comity seeks to respect. The concurrence attempts to show an identity of interest between the state courts and the state Attorney General under the rubric that both are instruments of the "sovereign." Comity is thus misconstrued as respecting some amorphous "state sovereign" rather than the integrity of the state courts. 693 F.2d at 554-55.

Rose v. Lundy[38] placed a requirement of absolute exhaustion of state court remedies upon any petitioner seeking federal review.[39] The deleted claims could only be raised on successive petitions after state courts had heard the issues; but successor petitions are likely to be dismissed under Habeas Corpus Rule 9(b)[41] without consideration on the merits.[42]

In theory, the hurdle of error preservation—erected in *Wainwright v. Sykes*,[43] and heightened in *Engle v. Isaac*[44] and *United States v. Frady*[45]—can be avoided by satisfying the "cause and prejudice" standard.[46] In practice, however, the Court has not articulated just what

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[38] 455 U.S. 509 (1982); *See* Galtieri v. Wainwright, 582 F.2d 348, 353 (5th Cir. 1978) (precursor of total exhaustion rule).

[39] Exhaustion requires that a claim of error be presented to the state courts for correction. At a minimum, any such claim would need to be presented on direct appeal, *see, e.g.*, MISS. CODE ANN. § 99-19-105 (Supp. 1982) (mandatory review of death penalties). Exhaustion can be achieved, however, by presenting the claim in a state collateral proceeding, *see, e.g., id.* § 99-35-145 (1972) (petition for writ of error corum nobis). The state court need not address the merits of a claim; exhaustion is satisfied by the mere presentation. 455 U.S. at 516; *see* Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits, 95 F.R.D. 435, 454-61 (1982).

There is one special precaution to observe in presenting claims to state courts. In keeping with the general curtailment of collateral relief, *see infra* notes 46, 51, to which certain members of the Supreme Court are dedicated, the terms in which the assignments of error are couched have become important. To be safe, claims should be expressed explicitly in federal constitutional terms, citing the clause or amendment upon which the claim is based. In Webb v. Webb, 451 U.S. 493, 501 (1981), reference to "the Full Faith and Credit Clause" was deemed inadequate to identify the claim as a federal constitutional one. The majority opinion said that such terminology left it ambiguous whether it was the federal or state clause that was referred to. *Id.* at 497. Although the opinion did suggest citing the specific constitutional clause or amendment, less specific, but unequivocal, references to a "federal question" should suffice. Citing and relying upon federal cases is another method for identifying issues as federal ones. *Id.* at 495-96. Unfortunately, this was one of those sad cases in which the facts did not fit the rule the Court was trying to enunciate. The state law that the majority insisted petitioner had relied upon failed "to mention any of the three words, 'full,' 'faith,' or 'credit.' " *Id.* at 503. Under *Rose v. Lundy*, a petition for habeas corpus relief that contains even a single claim that has not been presented to the state courts (a mixed petition) necessitates that the entire petition be dismissed unless it is amended to delete unexhausted claims.[40]

[40] *Rose v. Lundy*, 455 U.S. at 522.

[41] Habeas Corpus Rule 9(b), 28 U.S.C. § 2254 (1977); Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits, 95 F.R.D. 435, 459-60 (1982).

[42] *Rose v. Lundy*, 455 U.S. at 532-33.

[43] 433 U.S. 72 (1977).

[44] 456 U.S. 107 (1982).

[45] 456 U.S. 152 (1982).

[46] The "cause and prejudice" standard was first enunciated in Francis v. Henderson, 425 U.S. 536 (1976), concerning the raising of objections to grand jury composition

before trial. *Id.* at 542. The specific use of this standard in habeas corpus proceedings, however, began in Wainwright v. Sykes, 433 U.S. 72, 87, 90-91 (1977). *See generally* Forman v. Smith, 633 F.2d 634, 638-40 (2d Cir. 1980) (explaining scope of *Sykes* application). The main problem with this standard is that it is not clear what will suffice to constitute "cause," let alone "prejudice." The dissent by Justices Brennan and Marshall in *Engle v. Isaac* reiterates the view, expressed in *Sykes*, 433 U.S. at 99-100 n.1, that the "cause and prejudice" standard is "a mere house of cards whose foundation has escaped any systematic inspection." 456 U.S. at 144. Interestingly, the majority opinion in *Frady* admits as much: "[I]n Wainwright v. Sykes we refrained from giving 'precise content' to the term 'prejudice,' expressly leaving to future cases further elaboration of the significance of that term." 456 U.S. at 168. The "precise content" *Frady* offers is that a petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. This standard seems to burden a petitioner with the necessity to prove not only that the absence of assigned error *might* have changed the result in his trial, but further that the absence of such error would definitely have altered the verdict. The impossibility of proving the positive effect of an absence and thus satisfying such a standard is obvious on logical grounds alone. Fortunately, some lower federal courts have seen fit to inject some reality into this sterile standard and recognize "prejudice" without a specific clairvoyant delineation of how a result would have been otherwise. *See* Washington v. Strickland, 673 F.2d 879, 901-02 (5th Cir. 1982), *rev'd and remanded*, 693 F.2d 1243, 1260-62, 1270-74 (5th Cir. 1983) (en banc), *petition for cert. filed*, 51 U.S.L.W. 3704 (U.S. Mar. 21, 1983) (No. 82-1554) (attempting to translate Court's cause and prejudice test into reality); Jones v. Thigpen, 555 F. Supp. 870, 879 (S.D. Miss. 1983) ("[T]he 'prejudice' which flows from this lack of defense is obvious."). Considerations of fairness and justice can only applaud such a commonsensical and courageous approach to an area in which the Supreme Court has not provided a viable standard. *Cf.* Engle v. Isaac, 456 U.S. at 143-44 (Brennan, J., dissenting) ("The Court still refuses to say what 'cause' is").

In regard to "cause," it appears that even if a "claim *did not exist* at any time during" the trial or direct appeal procedures, this will not satisfy the "cause" requirement. *Engle v. Isaac*, 456 U.S. at 141. In *Engle v. Isaac*, 10 months after the petitioner's trial, Ohio changed its well-established law that the petitioner had relied upon in not objecting to certain jury instructions. It was noted that ". . . Isaac's claim is manifestly of the sort that *could not have been raised at trial or on appeal*, for the claim only came into existence on the day that Isaac's last appeal was rejected." *Id.* at 140. In other words, just because well-established state law would render the raising of a claim on some particular ground "futile," one must nonetheless pursue the claim, despite its futility, if it is to be preserved. Perceived futility will not satisfy "cause": "we note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130. In attempting to mitigate the clear unfairness of this standard, this rule has been saturated with ambiguity: "We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object." *Id.* at 131. The language of this opinion explicitly acknowledges there is as yet no clear content to this standard. Isaac's situation points to the final irony present in these new Supreme Court decisions that derogate habeas corpus protection:

> In the present case, petitioner Engle responded to Isaac's petition by raising the issue of Isaac's failure to exhaust. Therefore, the Court of Appeals clearly erred, under *Picard* and our whole line of exhaustion precedents, in granting

"cause and prejudice" is;[47] although it has indicated the standard is difficult to attain. Trial attorneys for defendants are thus placed in a somewhat untenable position.[48] To protect a defendant's (perhaps inchoate) rights, trial attorneys must object at every point in a trial when even the slightest hint of a concealed basis for a constitutional claim exists.[49] In respecting the state interest in the integrity and finality of trial court results,[50] the Supreme Court has effectively precluded review by federal courts of many viable state prisoner claims to which the state courts were not sensitive.[51]

These heightened exhaustion and error preservation requirements

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habeas relief to Isaac instead of requiring exhaustion. The proper disposition of Isaac's case is thus to reverse and remand with instructions to dismiss on exhaustion grounds. The Court's failure to order such a disposition is incomprehensible: Barely a month ago this Court emphatically reaffirmed the exhaustion doctrine, and indeed extended it, announcing a requirement of "total exhaustion" for habeas petitions. But today the Court finds the nostrum of "cause and prejudice" more attractive, and so Rose v. Lundy is not applied. Sic transit gloria Lundy. In scarcely a month, the bloom is off the Rose.

456 U.S. at 141 (footnotes and citations omitted).

[47] *Engle v. Isaac*, 456 U.S. at 144.

[48] *Id.* at 144-45.

[49] *See id.* at 131 (rule might require objecting to every aspect of trial). Frequent and facially frivolous objections will likely alienate the judge and somewhat prejudice and confuse the jury. Defense counsel is thus faced with the difficult choice of foregoing these objections and hoping to win at the trial level, or making all the objections, diminishing chances of victory at trial, and creating a solid record upon which habeas corpus review can be based. If an attorney does not make the profuse objections, the defendant will have waived his right to claim error regarding any issue not objected to. It is not unheard of for a habeas corpus petitioner to make 20 or more assignments of error in his complaint, and for the Attorney General to contend that nearly all were waived because there was no objection at trial. Sometimes in the petition, one of the assignments of error is "ineffective assistance of counsel." The Attorney General will simultaneously argue that petitioner's trial counsel waived all of petitioner's constitutional rights and was nevertheless clearly effective. But if counsel was so effective, how did all petitioner's rights get waived? Though it may seem odd, some courts may not be adverse to accepting the Attorney General's contention. *Cf.* Reply Pre-Hearing Brief of Plaintiff at 33, Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983) (discussing this paradoxical contention by Attorney General).

[50] *See Engle v. Isaac*, 456 U.S. at 127-28, 148.

[51] There is little doubt but that the recent Supreme Court holdings are part of "the Court's progressive emasculation of collateral review of criminal convictions." *United States v. Frady*, 456 U.S. at 178. The "Great Writ" is seen as entailing costs that are too significant. *Engle v. Isaac*, 456 U.S. at 146-47. This curtailing of the "Great Writ" is the purpose, not the by-product, of *Engle v. Isaac* because the "Court's analysis is completely result-oriented." *Id.* at 144. The Court reshapes Isaac's "actual claim into a form that enables it to foreclose all federal review, when as plainly pleaded the claim was unexhausted." *Id.* at 143.

have, to a significant degree, changed the focus of habeas corpus proceedings from evaluating the merits of the claims to deciding whether claims are in a proper procedural posture to receive federal review.[52] To give some content to the ill-defined tests promulgated by the Supreme Court and to mitigate the harshness that could result from the decline—typified by *Engle v. Isaac* and *Rose v. Lundy*—in the traditional availability of habeas corpus relief, several circuit courts of appeal have qualified and interpreted these announced guidelines by referring to language from prior Supreme Court opinions.[53] The rule has emerged that unless the state court positively invoked the state preclusionary rule[54] to deny a hearing on the merits, there is no responsibility

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[52] There is a certain surreal quality to a federal district court hearing in which the debate centers on whether concededly meritorious habeas corpus claims can be heard and thus recognized, or whether the defendant must be executed because trial error was not properly preserved and exhausted by former counsel.

[53] One case frequently relied upon is Ulster County Court v. Allen, 442 U.S. 140, 154 (1979); *see also* Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982) (following rule laid down in *Ulster* of looking to whether state court positively invoked preclusion); Miller v. Estelle, 677 F.2d 1080, 1084 (5th Cir. 1982) (same); Euell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981), *reh'g denied*, 662 F.2d 1116 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2021 (1982); Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980), *cert. denied*, 450 U.S. 953 (1980); Darden v. Wainwright, 513 F. Supp. 947, 951 (M.D. Fla. 1981).

[54] The preclusionary rule most frequently invoked in Mississippi is Miss. Sup. Ct. R. 42, which is the contemporaneous objection rule. This rule contains the provision that in "extreme cases" the court may even raise issues on its own to "prevent manifest injustice." The Mississippi Supreme Court has found death penalty cases to be such "extreme cases" and has waived strict application of the contemporaneous objection rule. The Court has stated, "We do so with reluctance and only because this is a capital case." Culberson v. State, 379 So. 2d 499, 506 (Miss. 1980); *see* Bell v. State, 360 So. 2d 1206, 1215 (Miss. 1978) (court itself raised issues that were not objected to at trial or assigned as error on direct appeal). This policy of the Mississippi Supreme Court has recently been recognized by the federal courts. *See* Bell v. Watkins, 692 F.2d 999, 1003-04 (5th Cir. 1982); Jones v. Thigpen, 555 F. Supp. 870, 877 (S.D. Miss. 1983).

It appears that the Mississippi Supreme Court is somewhat erratic in applying this waiver of procedural bar in capital cases. In Leatherwood v. State, No. 53,914, slip op. at 6 (Miss. May 25, 1983) (en banc), the court stated that it may raise error on its own motion but is not required to do so. This statement conflicts with Hill v. State, No. 53,795, slip op. at 21-22 (Miss. May 4, 1983) (en banc), wherein the court stated that the contemporaneous objection rule is consistently applied in death penalty cases.

The court refused to recognize plain error in *Hill* as grounds for relief. Justice Robertson, who was joined in his dissent by Chief Justice Patterson, pointed out that "as a matter of fact" there had been no such consistent application of preclusion rules. *Hill*, slip op. at 2, 5-6, 9-11 (Robertson, J., concurring and dissenting). Given this propensity of the court to erratically invoke procedural bar, defense attorneys must be vigilant in making and preserving objections.

The errors precluded from review in *Hill* do not appear to be of constitutional di-

for the federal courts to invoke this rule on the state's behalf.[55] Similarly, the stark exhaustion requirement has been interpreted not to necessitate a specific enumeration to the state courts of all possible permutations of a claim.[56] Instead, it is enough that the substance of the issue is presented for review.[57]

The true significance of these hurdles to obtaining federal review can only be appreciated through reference to actual cases in which creative constitutional challenges have furnished grounds for reversal of a death sentence. Prior to vindication, the issues that such appeals travel upon are often viewed as pointless and futile "academic" challenges to statutory drafting. *Enmund v. Florida*[58] is a representative example of an appeal based on a "futile" issue involving the felony-murder rule.[59] The felony-murder rule was so entrenched in our jurisprudence that it would have appeared frivolous, even pedantic, to object at trial to its providing the basis for a death sentence. Such successful challenges indicate that incisive and well-formed critiques may receive a receptive

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mension. Although the court does not say so, it is conceivable that the statements in *Leatherwood* and *Hill* could be harmonized by limiting the application of procedural bar to non-constitutional issues while waiving such bar when constitutional issues are present.

[55] *See* Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir. 1982); Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. 1982); Miller v. Estelle, 677 F.2d 1080, 1084 (5th Cir. 1982).

[56] Fortunately, some lower federal courts have not attempted to torture facts, as the Supreme Court did in *Webb*, to find a lack of exhaustion. *See supra* note 39. On the contrary, the issue seems to have centered on a practical determination of whether the alleged error was clearly delineated and whether it was reasonably identified in some manner as having a federal question as its basis. The most assiduous discussion of what meets this standard is contained in Daye v. Attorney General, 696 F.2d 186, 189-94 (2d Cir. 1982). *Daye* elaborates four methods, beyond citing chapter and verse of the constitution, by which a petitioner can prove proper presentation to state courts. *Id.* at 194. The four methods are: (a) relying on federal cases, (b) relying on state case employing constitutional analysis, (c) using terminology particular to the constitution, and (d) citing facts similar to mainstream constitutional litigation. The dissent in *Daye* advocates a more stringent *Webb*-type test. *Id.* at 199; *see also* Anderson v. Harless, 103 S.Ct. 276, 277 (1982) (enumerating facts to imply a federal claim is insufficient presentation); Minor v. Lucas, 697 F.2d 697 (5th Cir. 1983) (citing Anderson v. Harless, 103 S.Ct. 276 (1982); Pappageorge v. Sumner, 688 F.2d 1294, 1295 (9th Cir. 1982) (new facts constitute "materially broader" unexhausted claim).

[57] *But see* Pappageorge v. Sumner, 688 F.2d 1294, 1295 (9th Cir. 1982) (adding "key" factual allegations constitutes failure to exhaust).

[58] 102 S.Ct. 3368 (1982).

[59] Enmund was sentenced to die under a felony-murder statute. The Court held that "punishment must be tailored to his personal responsibility and moral guilt. . . . [I]n the absence of proof that Enmund killed or attempted to kill and regardless of whether Enmund intended or contemplated that life would be taken we reverse the judgment upholding the death penalty." *Id.* at 3378-79.

ear. The foremost problem is not the merits of such a challenge, but rather the difficulty in reaching the federal forum. These constitutional challenges are all too often absent from both the trial record and the state court appeal; as such, they are precluded from review in a federal forum. Practitioners at the trial level should become conscious of, and sensitive to, their responsibility not only for customary trial conduct, but also for a far-sighted view of the potential constitutional issues that a case may pose.

III. The Statutory Scheme in Mississippi

In Mississippi,[60] the statutes defining the elements of capital murder[61] and those delineating the sentencing process[62] combine to form a relatively complex matrix. The interface of these various statutes creates some anomalies in Mississippi's statutory scheme. To reveal these anomalies, the structure of the overall scheme must be scrutinized.

Although Mississippi distinguishes between simple[63] and capital murder,[64] no distinctions of degree within either category of murder

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[60] For comparison to other state schemes, see *supra* note 18.

[61] The capital murder statutes necessarily interface with, and are complicated by, statutes that define simple murder, manslaughter, and major felonies such as robbery, rape, burglary, arson, or kidnapping. *See infra* notes 73-76 and accompanying text.

[62] Beyond the sentencing process itself, there must also be consideration of the dimensions of the various potential sentences. *See* Miss. Code Ann. §§ 97-3-21 to -29 (1972 & Supp. 1982).

[63] Simple murder is provided for in *id.* § 97-3-19(1) (1982):

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
> (a) When done with deliberate design to effect death of the person killed, or of any human being;
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;
> (c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

[64] The statutory definition of capital murder is found in *id.* § 97-3-19(2):

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman;
> [Definition of "peace officer" deleted]
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

the defendant intended to kill, attempted to kill, or actually performed

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Id. at 3379. Despite this clear language, *Enmund* has been construed to mean "absence of finding by the jury" of culpability. Jones v. Thigpen, 555 F. Supp. 870, 878 (S.D. Miss. 1983). This difference can have enormous significance with respect to whether a petitioner who has achieved a vacation of sentence under *Enmund* can be re-tried on the issue of sentence and again be subjected to the death penalty.

The question whether resentencing to death is proper is answered by an analysis of the Supreme Court's most recent double jeopardy decision in Tibbs v. Florida, 457 U.S. 31 (1982). Burks v. United States, 437 U.S. 1 (1978), provides the backdrop for understanding *Tibbs*. *Burks* reviewed all prior double jeopardy cases, distilled their productive thinking, and formulated a cogent doctrine. In essence, *Burks* held that after reversal of a conviction, retrial was not precluded if the reversal was based upon trial error alone. When the government had proved its case, but trial error caused the conviction to be overturned, the double jeopardy clause afforded the defendant no protection. If the case was proved in the first trial, retrial would not afford the government a new chance to do something that it had failed to do initially. On the contrary, it merely afforded the criminal defendant a second chance to dispute that proof in a proceeding uninfected by error. *Id.* at 15-16.

Reversal based upon evidentiary insufficiency, however, is a horse of a different color. If the conviction is overturned because of a failure of proof, the double jeopardy clause applies, and the accused is shielded from reprosecution. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced . . . ." *Id.* at 11 n.6. Acquittal at the appellate level for lack of proof is tantamount to acquittal by the jury at the trial level, and thus precludes retrial. "[I]t is difficult to conceive how society has any . . . interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Id.* at 16.

The analogy to an *Enmund*-based vacation of a death sentence is obvious. In *Enmund*, the Court held there was an "absence of proof" of personal culpability. 102 S. Ct. at 3379. The Court made such a finding despite the fact that the dissent pointed out there was evidence, testimony by a co-felon given in exchange for immunity, that Enmund had planned and set up the crime. *Id.* at 3380. The majority was able to find "absence of proof" in the face of this testimony apparently because the evidence was insufficient, as a matter of law, to qualify as proof of intent beyond a reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307, 313-24 (1979) (criminal convictions must be beyond a reasonable doubt); *In re* Winship, 397 U.S. 358, 361-68 (1970) (preponderance of the evidence is not enough in criminal context). In other words, *Enmund* requires vacation of a death sentence unless there is evidence sufficient to constitute some proof beyond a reasonable doubt that defendant killed, attempted to kill, or intended to kill.

Tibbs relies heavily upon *Burks*, and refines the distinctions made in *Burks*. The refinement takes the form of distinguishing reversal for "insufficiency" of evidence from reversal for improper "weighing" of evidence. If the appellate court acts merely as a "thirteenth juror," then retrial is possible. 457 U.S. at 44-46. This new exception outlined in *Tibbs* can have no effect upon the significance of an *Enmund*-based vacation of a death sentence. To vacate a sentence under *Enmund*, there must be a failure of proof of intent or attempt to kill and therefore a legal insufficiency of the evidence. If there is enough proof of intent so that evidence must be "weighed," *Enmund* may not be used as grounds for vacation of sentence. Any vacation of sentence under *Enmund* necessarily falls under the general scope of the double jeopardy clause as announced in *Burks* and

the killing.[81] In effect, the Court has written into the capital murder statutes of all states the restriction that, absent some proof of individual culpability, a defendant may not be sentenced to die.[82] It would therefore appear that all statutory definitions of capital murder[83] are amended to include a general element of intent.[84]

If *Enmund* is not construed as modifying the definitions of murder, the Court will have done little to correct the anomalous, and per-

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reaffirmed in *Tibbs*.

The existence of a bifurcated trial adds a new twist to the application of the double jeopardy clause. One must keep in mind that *Enmund* concerns only the sentencing trial. If the guilt/innocence trial is not kept distinct from the sentencing trial, there will be a constant confusion between the evidence being both "sufficient" to convict in the guilt/innocence phase and, at the same time, "insufficient" to sentence to die. The only logical way to view a bifurcated trial for double jeopardy purposes is as two separate trials. Under an *Enmund* vacation of sentence, the guilt/innocence trial verdict remains untouched. The sentencing trial, however, is held for naught. To allow another sentencing trial, thus allowing the state to retry the entire case on the pretext of the sentencing hearing, and giving the state a second opportunity to devise some facsimile of evidence of intent, would violate the double jeopardy clause. As the Court has stated, "[T]he Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Burks*, 437 U.S. at 17. The double jeopardy clause was expressly held applicable to the sentencing phase of a capital murder trial in Bullington v. Missouri, 451 U.S. 430, 446 (1981). In *Bullington*, the defendant was "acquitted" on the capital punishment issue at the sentencing phase of his first trial. That sentencing trial had determined the evidence insufficient to warrant imposition of the death penalty. The Supreme Court held that the defendant could not, consistently with the double jeopardy clause, be exposed again to the possibility of a death sentence. *Id.* at 446.

[81] *Enmund*, 102 S.Ct. at 3379.

[82] *Enmund* actually does not unequivocally designate whether it is the statutory definition of murder that is to change, or whether the ban on imposing the death penalty without proof of culpability is merely a restriction operating during the sentencing hearing. If the *Enmund* rule applies only to the sentencing hearing, its effect will, paradoxically, be to preempt any such hearing by reducing the choice of sentence to one option only. If the rule is construed instead as modifying the statutory definitions of murder, it will be a most useful factor, injecting a much-needed qualitative distinction between capital and non-capital homicides. *See supra* notes 75-78 and accompanying text.

[83] *E.g.*, MISS. CODE ANN. § 97-3-19(2) (Supp. 1982).

[84] *See supra* note 67. This analysis of *Enmund* is not universally accepted. *See* Jones v. Thigpen, 555 F. Supp. 870, 878 n.5 (S.D. Miss. 1983) (individual culpability to be evaluated during sentencing proceeding). However, the opinion in Reddix v. State, 554 F. Supp. 1212 (S.D. Miss. 1983), clearly supports an interpretation of *Enmund* as redefining the statutory construction of murder. "The trouble with this *statute* which has occasioned this very lengthy record is occasioned by § 97-3-19(2)(e) which seems to make it unnecessary that there be any design or intention to effect death." *Id.* at 1213 (emphasis added).

haps unconstitutional, statutory scheme[85] that Mississippi has devised for homicide. Beyond these problems that would remain with the scheme, if a defendant can still be convicted of capital murder regardless of culpability, and shielded from the death penalty only at the sentencing hearing, then the usefulness of *Enmund* at the trial level may be negated in practical terms.

Circumstantial evidence is often a major, if not the only, basis of proving guilt,[86] Therefore, because determination of intent or lack of intent may well depend upon juror inference, unless the intent factor is explicitly made an element of the crime, it will be difficult or impossible to determine whether there has been a finding of fact regarding intent. Such a determination of individual culpability is properly a part of the guilt/innocence hearing, in which the determination of the defendant's legal responsibility for the crime is made.[88] Since the defendant's legal responsibility for the crime is already assumed during the sentencing hearing, it would be unrealistic to expect jurors to make an independent and unmuddled determination of culpability.[89] The sentencing hearing is already a complex procedure of weighing circumstances and to make it more intricate by adding *Enmund* questions to the already difficult sentencing determination would serve only to encourage arbitrary and capricious imposition of the death penalty.[90]

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[85] MISS. CODE ANN. § 97-3-19 (Supp. 1982).

[86] *See, e.g., Enmund*, 102 S.Ct. at 3371 ("no direct evidence at trial that Earl Enmund was present"); Jones v. State, 381 So. 2d 983, 995 (Miss. 1980) ("no testimony indicating that the defendant was the one who struck the blows"). and it is from this evidence that the jury must draw the inferences necessary to convict.[87]

[87] The drawing of inferences is often complicated by misleading closing arguments. *See* Jones v. State, 381 So. 2d 983, 999 (Miss. 1980) (court concluded that prosecutor's statement "had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact").

[88] The entire sentencing phase is based upon the assumption that guilt is already established. MISS. CODE ANN. § 99-19-101(1) (Supp. 1982).

[89] The addition of such a fact determination in the sentencing phase would weaken the guidance that must be given the jury.

[90] The complexity of this procedure is illustrated by the varying burdens of proof included in the different phases of the sentencing procedure. Aggravating circumstances must be proven beyond a reasonable doubt, but proof of mitigating circumstrances need be rebutted only by a preponderance of the evidence. *See, e.g.*, ALA. CODE § 13A-5-45(e), (g) (1982) (burden of proof requirements delineated); TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 1981 & Supp. 1982-3) (sentencing findings must be beyond a reasonable doubt). This allocation of proof burdens is necessary under constitutional due process guarantees. Jackson v. Virginia, 443 U.S. 307, 313-24 (1979); *In re* Winship, 397 U.S. 358, 361-68 (1970).

These anomalies[91] in the Mississippi statutory murder scheme are cited here only to elucidate the general problems attendant thereto. This exposition serves as a useful background against which to view the unconstitutionality of two aggravating circumstances used in capital sentencing procedures.

IV. Aggravating Circumstance (d)

During the sentencing hearing that follows a defendant's conviction of capital murder at the guilt/innocence hearing, the prosecution presents evidence of statutory aggravating circumstances to the jury.[92] One circumstance frequently employed provides:

> (d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.[93]

Under common law, when the elements of the crime of murder include the actual deed of killing as well as an element of intent or premeditation, because a killing was committed "while engaged in the commission of" a felony would exacerbate the disagreeable character of the deed. When a defendant is convicted of felony-murder, however, a quite different situation exists. The original purpose served by the fel-

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[91] This is not intended as an exhaustive expose' of the structural problems in the Mississippi statutory scheme, but further enumeration is beyond the scope of this article.

[92] This part of the comment focuses on and discusses the unconstitutional aspects of aggravating a capital felony-murder charge, under Miss. Code Ann. § 97-3-19(2)(e) (Supp. 1982), with the circumstance "while . . . engaged . . . in the commission of" a felony, pursuant to *id.* § 99-19-101(5)(d). The criticisms of this logical inconsistency, the double jeopardy violation, and the sentencing disproportionality attendant to aggravating a felony-murder charge in this manner apply with equal validity to other aspects of the Mississippi capital sentencing scheme. These same problems arise if: § 97-3-19(2)(a) is conjoined with § 99-19-101(5)(e) or (g) (disrupting law enforcement aggravates killing peace officer); § 97-3-19(2)(b) is conjoined with § 99-19-101(5)(a) or (b) (killing by person under life sentence aggravated by the killing being by person under life sentence); § 97-3-19(2)(c) is conjoined with § 99-19-101(5)(d) (killing by bomb aggravated by using bomb); § 97-3-19(2)(d) is conjoined with § 99-19-101(5)(f) (killing for pay aggravated by killing for pay); § 99-3-19(2)(f) is conjoined with § 99-19-101(5)(g) (killing elected official aggravated by disrupting government). *See supra* notes 23, 64. The felony-murder aspect, § 97-3-19(2)(e) conjoined with § 99-19-101(5)(d), is emphasized because it is by far the most often invoked capital charge, and, therefore, there are more cases exploring it.

[93] Miss. Code Ann. § 99-19-101(5)(d) (Supp. 1982).

ony-murder rule was to enable courts to impute to a felon, on the basis of his felony, a *mens rea* sufficient to sustain also a finding of murder.[94] Thus, whether the felon actually intended to kill was an irrelevant point. When this rule is augmented by laws holding accomplices guilty for the crimes of the principal offender,[95] the class of persons who may be found guilty of murder widens considerably.

Sentencing under the felony-murder rule creates a serious logical inconsistency, however, when the aggravating circumstance of "while engaged in the commission of" a robbery, for example, is employed. The factual findings of the conviction only mean that a defendant committed a robbery; the defendant is "guilty of murder" by legal implication only.[96] Given this basis for the conviction, it is anomalous to find that the defendant's crime of *robbery*—murder only through legal implication—*is more despicable because it was done during the commission of a robbery.*[97]

The way this anomaly arises warrants tracing. In the guilt phase of a trial, the prosecution attempts to convince the jury, often with circumstantial evidence alone,[98] that the defendant committed the robbery. There is no need to prove that the defendant committed the murder, only that the murder occurred incident to the robbery.[99] Once such a robbery conviction is achieved, however, something magic hap-

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[94] W. LAFAVE & A. SCOTT, *supra* note 67, at 192-94, 554.

[95] *Id.* at 553-54; *see, e.g.,* MISS CODE ANN. § 97-1-3 (1972).

[96] W. LAFAVE & A. SCOTT, *supra* note 67, at 263-64.

[97] A defendant convicted of felony-murder and facing aggravating circumstance (d) is, with respect to mustering mitigating circumstances to avoid the death penalty, in much the same posture as Alice in *Through the Looking Glass:*

> "Well, in *our* country," said Alice, still panting a little, "you'd generally get to somewhere else—if you ran very fast for a long time as we've been doing."'"A slow sort of country!" said the Queen. "Now, *here,* you see, it takes all the running *you* can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!"

L. CARROLL, THROUGH THE LOOKING GLASS 32 (1946).

[98] *See supra* note 86 and *infra* text accompanying notes 137-47.

[99] Since felony-murder often involves co-felons, there often really is a genuine uncertainty both as to who killed the victim and whether the non-killing co-felon had any idea murder would take place. *See* Beck v. Alabama, 447 U.S. 625, 630 (1980) (proof that "after petitioner had seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him"); Jones v. State, 381 So. 2d 983, 989 (Miss. 1980) ("record does not conclusively establish which of the two co-felons . . . wielded the blows"). Furthermore, statistics show that killing while committing robberies is highly unusual—not something that a co-felon would expect to have ensue. "[O]nly about one-half of one percent of robberies resulted in homicide." Enmund v. Florida, 102 S.Ct. 3368, 3378 (1982).

pens. Suddenly, the defendant has been found to be a murderer, not a robber. It is almost as though pixie dust were scattered in the courtroom causing everyone to forget that the defendant has *really* only been found to be a robber.[100] That forgotten fact is replaced by the assumption that the defendant is a murderer, whose murderous character must be evaluated to determine his sentence. To effect such evaluation, the jury is to think of the robbery as an *additional* act that *further* indicates the defendant's depraved heart. In effect, the defendant is being convicted of robbery *twice:* once as a means of being found guilty of murder and again when receiving the death penalty incident to having "committed the murder"—really robbery—under the aggravating circumstance of robbery.

In addition to violating strictures of elementary logic, the above-described situation appears to contravene guarantees against double jeopardy.[101] The Alabama courts, have recognized the principle that "[r]obbery cannot be aggravated by robbery or else the appellant is punished twice for the same act."[102] The court has carried this sort of analysis a step beyond the strict felony-murder context, in which the felony is the entire basis for the conviction, in *Reed v. State*[103] by declaring, "An element of the offense charged cannot be used as an aggravating circumstance to that offense."[104] This language indicates that even when a felony is only an augmenting element to a killing—perhaps to raise a charge in an indictment from simple murder to capital murder—and the killing itself is capable of proof, the felony still may not be used to aggravate the murder conviction during sentencing.

A further problem related to this duplicitous use of the felony component in capital sentencing arises in the disproportionality of sentencing inherent in the use of this aggravating circumstance within

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[100] Perhaps the more appropriate analogy is that the jury is unable to perceive that the emperor has no clothes, that is, the robber has no individual culpability for the killing.

[101] U.S. CONST. amend. V.; *But see* Leatherwood v. State, No. 53,914, slip op. at 6-7 (Miss. May 25, 1983) (en banc). In *Leatherwood*, the Mississippi Supreme Court held that circumstance (d) of § 99-19-101(5) could be used to aggravate capital felony-murder. The court's treatment of this issue, however, is totally devoid of any double jeopardy analysis. The court instead construes the issue to be whether jurors are receiving sufficient guidance. *Leatherwood*, slip op. at 6-7.

[102] Bufford v. State, 382 So. 2d 1162, 1174 (Ala. Crim. App. 1980); *see* Keller v. State, 380 So. 2d 926, 937 (Ala. Crim. App. 1980) (aggravating circumstance describing charge in indictment cannot be used).

[103] 407 So. 2d 153 (Ala. Crim. App. 1981).

[104] *Id.* at 161.

such a sentencing scheme. The prosecution's proof of a felony-murder not only satisfies the requirements for a capital murder conviction under Mississippi law, but also *automatically* establishes an aggravating circumstance.[105] Since only a single aggravating circumstance is required to support a death sentence, persons who are convicted of felony-murder enter the penalty hearing with the prerequisites for the death sentence already established. In a case "where the killing is deliberate [not a felony-murder], however, it is not punishable by death" unless the state comes forward with "proof of [additional] aggravating circumstances."[106] This problem has been noted and forthrightly addressed by the North Carolina Supreme Court:

> [T]he possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the 'automatic' aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.[107]

Under Mississippi law, there exists the precise disproportionality de-

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[105] If one compares MISS. CODE ANN. § 97-3-19(2)(e) (Supp. 1982) with *id.* § 99-19-101(5)(d), it becomes apparent that conviction on the principal charge establishes the necessary circumstances for the death penalty. This automatic establishment was straightforwardly acknowledged in a jury instruction employed just after Jackson v. State, 337 So. 2d 1242 (Miss. 1976). Compare state's instruction S-9:

> Proof beyond a reasonable doubt of the statutory elements of the capital offense with which the accused is charged shall constitute sufficient circumstances to authorize imposition of the penalty of death unless mitigating circumstances shown by the evidence outweigh the aggravating circumstances.

Record at 682, Irving v. State, 361 So. 2d 1360 (Miss. 1978).

Some states, including Mississippi, make it an aggravating circumstance for a murder to occur during the commission of a robbery and a separate circumstance for the murder to be committed for pecuniary gain. Alabama has invalidated this stockpiling of similar circumstances as contravening double jeopardy guarantees. *See* Colley v. State, 405 So. 2d 374, 389 (Ala. Crim. App. 1981); Cook v. State, 369 So. 2d 1251, 1256 (Ala. Crim. App. 1978). The Mississippi Supreme Court, while not couching its opinion in constitutional terms, has upheld such stockpiling of circumstances. Leatherwood v. State, No. 53,914, slip op. at 3-6 (Miss. May 25, 1983); Smith v. State, 419 So. 2d 563, 568 (Miss. 1982).

[106] Coker v. Georgia, 433 U.S. 584, 600 (1977).

[107] State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 568 (1979).

scribed in the foregoing quotation. This sort of irrational infliction of risk upon felony-murder defendants would seem susceptible to challenge.[108]

V. Aggravating Circumstance (h)

The Supreme Court enunciated in *Gregg v. Georgia*[109] a paradoxical rule when faced with evaluating the constitutionality of the following aggravating circumstance: "[T]he offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[110] The Court maintained that the circumstance was not vague and overbroad, but at the same time ruled that Georgia courts must confine the meaning of the circumstance to definite limits. (Why would something need confining unless it were vague and overbroad?)[111] In *Godfrey v. Georgia,*[112] however, the Court retreated from its faith in the Georgia courts' ability to properly limit the application of this circumstance. The Court reprimanded the Georgia courts' failure to properly confine the circumstance to cases of torture and such undue suffering, yet continued to find the language of the circumstance constitutionally proper.[113]

In *Proffitt v. Florida,*[114] the Supreme Court evaluated an aggravating circumstance containing the language "especially heinous, atrocious, or cruel."[115] As was the case in *Gregg* and *Godfrey*, such language was scrutinized solely under the guarantees of the eighth and fourteenth amendments.[116] The challenge to this particular aggravating circumstance in *Proffitt* was rejected for the reasons articulated in *Gregg.*[117] In spite of this ruling by the Supreme Court, aggravating circumstances similar to the one at issue in *Proffitt* do not always survive at the state court level. The Supreme Court of California, in *People v. Superior Court,*[118] relied upon the due process guarantee[119] of both the California and federal constitutions to declare unconstitutionally vague

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[108] U.S. Const. amends. V, VIII, XIV.
[109] 428 U.S. 153 (1976).
[110] *Id.* at 165 n.9.
[111] *Id.* at 201.
[112] 446 U.S. 420 (1980).
[113] *Id.* at 432.
[114] 428 U.S. 242 (1976).
[115] *Id.* at 255.
[116] *Id.* at 247.
[117] *Id.*
[118] 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982); *see supra* note 2.
[119] U.S. Const. amends. V, XIV; *see supra* note 3.

a circumstance—identical to that in *Proffitt*—couched in the terms "especially heinous, atrocious, or cruel."[120] Unfortunately, the Supreme Court in *Gregg*, *Godfrey* and *Proffitt* did not opt for this more decisive approach.

The language of Mississippi's aggravating circumstance (h), "especially heinous, atrocious or cruel,"[121] is identical to that of California. Although the question whether this circumstance is susceptible to a federal due process challenge similar to the one in *Superior Court* is open, this circumstance can undoubtably be scrutinized under the criteria set up in *Godfrey*.[122] A representative random sampling[123] of recent[124] capital murder convictions[125] reveals that circumstance (h) was used in an extremely high percentage of cases. Of the seventeen cases

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[120] *People v. Superior Court*, 647 P.2d at 81, 183 Cal. Rptr. at 805.

[121] MISS. CODE ANN. § 99-19-101(5)(h) (Supp. 1982).

[122] *See supra* note 113 and accompanying text.

[123] The figures here do not pretend to be an analysis of all recent capital murder convictions in Mississippi. However, it quickly became apparent that the data was so compelling and one-sided that once a representative sample (at least half of the cases tried under Mississippi's sentencing scheme) was attained, the statistical likelihood that an exhaustive compilation would differ significantly became de minimus. Furthermore, because the data was so one-sided, the practical problem of trying to thoroughly survey a fluid and constantly expanding class of convictions did not need to be faced.

[124] Basically, the only cases suitable to this sampling are those tried after the scheme developed in Jackson v. State, 337 So. 2d 1242, 1250-56 (Miss. 1976), was replaced by the subsequently enacted statute because prior to that time the bifurcated trial with an enumeration of aggravating circumstances was not used. *See, e.g.*, Hicks v. State, 355 So. 2d 679, 680 (Miss. 1978) (absence of bifurcation with enumeration of aggravating circumstances).

[125] Capital murder convictions are used as the basis for the sampling. The other two likely possibilities for the basis were (1) capital murder indictments, and (2) capital murder cases in which the death penalty was actually imposed. The problem with using indictments is that there are cases in which, though the initial charge is capital murder, the form of final sentencing proceeding is not the one at issue here. This occurs, for example, when sentencing a juvenile under MISS. CODE ANN. § 43-21-159(3) (Supp. 1982), *see, e.g.*, Scruggs v. State, 412 So. 2d 732, 732 (Miss. 1981) (juvenile sentencing under statute); or when the conviction is based on a lesser offense, *see, e.g.*, Rasco v. State, 378 So. 2d 211, 212 (Miss. 1980) (state failed to prove felony part of felony-murder). The problem with using only convictions for which the death penalty is actually imposed is that this approach needlessly excludes a whole class of cases in which the jury is instructed with aggravating circumstances but returns a life sentence only. The strongest argument against including life sentence cases is that capital murders that result in life sentences are not as "especially heinous, atrocious or cruel," and the jury would not have been instructed as to that circumstance. Therefore, at first blush, these cases would seem likely to skew the result to show that circumstance (h) is not applied indiscriminately. Fear of such skewing, however, was proved to be totally unfounded in fact. *See infra* note 126 and accompanying text.

surveyed, circumstance (h) was used as a sentencing instruction in sixteen of them (94.1%).[126] It will be useful to examine specific cases to illustrate the indiscriminate application of circumstance (h) and the arbitrary and capricious sentencing that results, in part, therefrom.

In *Gaines v. State*,[127] the victim was shot in the head, was severely injured in the vaginal area, and had skin scraped off her elbows. Gaines was implicated in the murder by his own specific factual admissions that he offered in exchange for payment.[128] On appeal, Gaines did not question the sufficiency of the evidence to support the conviction.[129] Aggravating circumstance (h), as well as (f) and (d), was used to instruct the jury.[130] Gaines was sentenced to life imprisonment.[131]

In *Tubbs v. State*,[132] the victim had been severely beaten, resulting in broken bones in the head, neck, and chest. The victim's liver was lacerated, and there was evidence of strangulation.[133] Tubbs was convicted in large part on the basis of a note he had written confessing to the killing.[134] The court instructed the jury with the same three aggravating circumstances present in *Gaines*,[135] and the jury returned a sentence of life imprisonment.[136] Limiting the use of circumstance (h) to

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[126] The 16 cases in which aggravating circumstance (h) was used in instructing the jury are: Edwards v. State, No. 53,800, slip op. at 12 (Miss. Mar. 16, 1983); Wheat v. State, 420 So. 2d 229, 241 (Miss. 1982); Smith v. State, 419 So. 2d 563, 568 (Miss. 1982); Record at 2007, Johnson v. State, 416 So. 2d 383 (Miss. 1982); Record at 287, Culberson v. State, 412 So. 2d 1184 (Miss. 1982); Record at 1191-92, Gaines v. State, 404 So. 2d 557 (Miss. 1981); Record at 989, Johnson v. State, 404 So. 2d 553 (Miss. 1981); Record at 1160-61, Tubbs v. State, 402 So. 2d 830 (Miss. 1981); Record at 567-68, Baugh v. State, 388 So. 2d 141 (Miss. 1980); Reddix v. State, 381 So. 2d 999, 1013 (Miss. 1980); Record at 782-83, Jones v. State, 381 So. 2d 983 (Miss. 1980); Record at 131, Caldwell v. State, 381 So. 2d 591 (Miss. 1980); Record at 995-97, Coleman v. State, 378 So. 2d 640 (Miss. 1979); Gray v. State, 375 So. 2d 994, 1003 (Miss. 1979); Record at 179-81, Voyles v. State, 362 So. 2d 1236 (Miss. 1978); Washington v. State, 361 So. 2d 61, 64 (Miss. 1978).

The only case found in the sample in which circumstance (h) was not used to instruct the jury during the sentencing phase was Gentry v. State, 416 So. 2d 650 (Miss. 1982). Record at 755-57. In *Gentry*, only aggravating circumstance (d): "while engaged in the commission of," was submitted to the jury. Gentry received a life sentence. Record at 769.

[127] 404 So. 2d 557 (Miss. 1981).

[128] *Id.* at 559.

[129] *Id.* at 560.

[130] Record at 1191, Gaines v. State, 404 So. 2d 557 (Miss. 1981).

[131] Record at 1230, *Gaines v. State.*

[132] 402 So. 2d 830 (Miss. 1981).

[133] *Id.* at 831.

[134] *Id.* at 832-33.

[135] Record at 1160-61, Tubbs v. State, 402 So. 2d 830 (Miss. 1981).

[136] Record at 1165, *Tubbs v. State.*

the type of fact situations that existed in both *Tubbs* and *Gaines* would probably be constitutionally defensible.

Illustrating the opposite extreme to *Tubbs* and *Gaines* is *Jones v. State*,[137] in which the robbery-murder was perpetrated by co-felons, and there was no proof of premeditation or individual culpability for the killing.[138] Although the victim was killed by blows to the head with a blunt weapon,[139] the proof indicated the perpetrators did not have any murder weapon with them.[140] Jones, when arrested, was not in possession of any of the victim's property but his co-felons were.[141] Jones was only seventeen years old at the time of the crime,[142] and he is at least mildly mentally retarded (an overall I.Q. of perhaps forty-one).[143] The court recognized that all the witnesses that linked Jones to the circumstantial evidence seriously impeached themselves during their respective testimonies.[144] Despite this, a jury instruction including aggravating circumstance (h) was requested and given,[145] primarily based on color photographs of the victim's wounds.[146] The jury returned a

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[137] 381 So. 2d 983 (Miss. 1980).

[138] *Id.* at 989, 995, 999.

[139] Record at 574, 578, 583, 586, Jones v. State, 381 So. 2d 983 (Miss. 1980).

[140] Record at 746, 784, Jones v. State, 381 So. 2d 983 (Miss. 1980). The habeas corpus relief granted Jones by the federal district court was based precisely on this *Enmund*-type issue. Jones v. Thigpen, 555 F. Supp. 870, 879 (S.D. Miss. 1983).

[141] Record at 556, Jones v. State, 381 So. 2d 983 (Miss. 1980).

[142] Pre-Hearing Brief of Plaintiff at 30, Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983); *cf.* Record at 733-34, Jones v. State, 381 So. 2d 983 (Miss. 1980).

[143] Jones v. Thigpen, 555 F. Supp. 870, 879 (S.D. Miss. 1983).

[144] Plaintiff's Post-Hearing Brief at 8-10, Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983); Jones v. State, 381 So. 2d 983, 987-89 (Miss. 1980).

[145] Record at 782-83, Jones v. State, 381 So. 2d 983 (Miss. 1980). In a situation like this, when the conviction of one co-felon is based upon the felony-murder rule alone (there being no proof or finding of individual culpability) the use of circumstance (h) should be absolutely prohibited, no matter how "especially heinous, atrocious or cruel" the killing. All the defendant has actually been convicted of is robbery. The clear authority of Eddings v. Ohio 455 U.S. 104, 105 (1982), and Lockett v. Ohio, 438 U.S. 586, 606 (1978), mandates that sentencing must focus on the individual defendant and *his* crime. In *Jones v. State*, defendant's crime was robbery, which cannot be "especially heinous, atrocious or cruel." The fact situation in Beck v. Alabama, 447 U.S. 625 (1980), illustrates that a co-felon to a felony-murder may be totally surprised by a "heinous" killing by his co-felon. 447 U.S. at 629-30. While it is proper to find the defendant legally responsible for the acts of his co-felon, sentencing must nonetheless be based exclusively upon defendant's individual culpability. Enmund v. Florida, 102 S.Ct. at 3368, 3378 (1982). Therefore, applying circumstance (h) in such a felony-murder situation is unconstitutional when there is no proof beyond a reasonable doubt of individual culpability for the killing.

[146] Record at 588, Jones v. State, 381 So. 2d 983 (Miss. 1980).

finding of aggravating circumstances, including circumstance (h), and sentenced Jones to death.[147]

To keep circumstance (h) within constitutional bounds, it would be necessary for trial judges to prohibit jury instructions containing circumstance (h) unless the equivalent of torture (or undue suffering) was present.[148] Clearly, there was no torture in *Jones*.[149] Limitation on the application of the circumstance must operate at the trial level; it cannot wait for review by the Mississippi Supreme Court, as such error has not, by itself, been considered sufficient for reversal.[150] This comparison of *Jones* with *Gaines* and *Tubbs* illustrates the vacuous and indiscriminate application of circumstance (h). If one must extrapolate the current rule governing when circumstance (h) has been permitted to be used in Mississippi, it would have to be couched in ridiculous terms like: "if the victim bleeds, the crime may be especially heinous, atrocious or cruel." Such a construction of the circumstance would seem unconstitutional.

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[147] Record at 781.

[148] Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980); *cf.* Clark v. State, 387 So. 2d 1124, 1134 (La. 1980) (torture or pitiless infliction of pain required).

It does appear that at the Mississippi Supreme Court there is presently emerging a recognition that circumstance (h) is being applied in an unconstitutional manner. Justice Prather, with whom Chief Justice Patterson and Justices Hawkins and Robertson concurred, noted that Mississippi courts were not restricting circumstance (h) to as narrow a construction as *Godfrey* mandates. Edwards v. State, No. 53,800, slip op. at 23-25 (Miss. Mar. 16, 1983) (Prather, J., dissenting). The majority opinion in *Edwards* by Justice Bowling dismisses Godfrey v. Georgia, 446 U.S. 420 (1980), as inapposite without reconciling this dismissal with Gregg v. Georgia, 428 U.S. 153 (1976) or Proffitt v. Florida, 428 U.S. 242 (1976). *See infra* text accompanying notes 153-55. The majority opinion relies upon Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), to find that the meaning of circumstance (h) was "a matter of common knowledge so that ordinary men would not have to guess at what was intended." Edwards v. State, No. 53,800, slip op. at 16 (Miss. Mar. 16, 1983). The *Edwards* majority makes this holding despite such Fifth Circuit authority appearing in conflict with both prior and subsequent Supreme Court precedent. *See* Godfrey v. Georgia, 446 U.S. 420, 436-37 (1980) (Brennan and Marshall, J.J., concurring) (bare words of statute inadequate); Gregg v. Georgia, 428 U.S. 153, 201 (1976) (bare words could apply to any murder).

[149] The Fifth Circuit, in Gray v. Lucas, 677 F.2d 1086, 1110 (5th Cir. 1982), characterized the killing in *Jones* as "especially heinous, atrocious or cruel" because an "elderly man was beaten to death with an iron wrench." The court made this statement despite an absence of proof regarding a wrench in the *Jones* trial.

[150] *See infra* notes 157-59 and accompanying text.

VI. Ramifications of the Unconstitutionality of Aggravating Circumstances

Godfrey v. Georgia[151] demonstrated that the unconstitutionality of aggravating circumstances can be proper grounds for vacation of a death sentence.[152] Furthermore, the fundamental premise of *Gregg*[153] and *Proffitt*[154] was that, had the circumstance been found unconstitutional as challenged, this determination would be sufficient to vacate the death sentence.[155] This implicit rule—that the unconstitutionality of aggravating circumstances is sufficient to vacate the death sentence—was straightforwardly recognized in *Stephens v. Zant*.[156] The *Stephens* court deemed that the use of such an unconstitutional circumstance resulted in improper jury instruction.[157] The availability of relief in these cases concerning unconstitutionality is in stark contrast to the lack of relief available in cases in which the jury erroneously finds an aggravating circumstance to exist and relies upon the error in passing sentence.[158] The distinction between vacation of a sentence for an improper jury *instruction* (use of unconstitutional aggravating circumstance) and affirmance of a sentence despite erroneous jury fact finding of an aggravating circumstance is clearly delineated in *Williams v. Maggio*.[159]

In *Stephens*, one of the three aggravating circumstances found by

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[151] 446 U.S. 420 (1980).

[152] *Id.* at 432-33.

[153] 428 U.S. 153 (1976).

[154] 428 U.S. 242 (1976).

[155] *See Gregg*, 428 U.S. at 201-02; *Proffitt*, 428 U.S. at 258-59.

[156] 631 F.2d 397 (5th Cir. 1980), *cert. granted*, 454 U.S. 814 (1981).

[157] *Id.* at 405-06.

[158] *See, e.g.*, State v. Monroe, 397 So. 2d 1258, 1276 (1981) (no constitutional need to vacate if jury errs). There are two methods of acknowledging that a jury's finding of an aggravating circumstance was erroneous. First, there is the direct method of declaring a jury's finding was incorrect. *See, e.g.*, Burger v. State, 245 Ga. 458, 461, 265 S.E.2d 796, 799 (1980); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, 263 (1976). The second method, which is indirect, is the refusal by both state and federal courts to evaluate more than a single aggravating circumstance that the jury proffered. *See, e.g.*, Williams v. Maggio, 679 F.2d 381, 390 (5th Cir. 1982); Williams v. Blackburn, 649 F.2d 1019, 1025 (5th Cir. 1981). Regardless of which method is employed to acknowledge the jury's erroneous finding, all that need be shown to sustain the death sentence is that at least one aggravating circumstance that the jury found is still valid. Williams v. Maggio, 679 F.2d at 390; Williams v. Blackburn, 649 F.2d at 1025; Burger v. State, 265 S.E.2d at 800; Stephens v. State, 227 S.E.2d at 263.

[159] 679 F.2d 381, 390 (5th Cir. 1982). In *Maggio*, the court stated that "in the absence of facial unconstitutionality, one [aggravating circumstance] may properly serve as the basis for appellate affirmation of the death sentence." *Id.*

the jury as a basis for sentencing Stephens to death was later declared unconstitutional by the Georgia Supreme Court.[160] The Court of Appeals for the Fifth Circuit held:

> [The use of this unconstitutional circumstance made it] impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in captial cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.[161]

The Supreme Court has granted certiorari in *Zant v. Stephens*[162] and has certified a question[163] to the Georgia Supreme Court, requesting an explanation of the rational state interest served by affirming death sentences as long as at least one aggravating circumstance survives review.[164] The question presented by the petitioner in *Stephens*, the At-

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[160] The circumstance was declared unconstitutional in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), but Stephens' sentence was upheld nonetheless. Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261, 263 (1976).

[161] 631 F.2d at 406. Justice Prather's opinion in Edwards v. State, No. 53,800, slip op. (Miss. Mar. 16, 1983), indicates substantial minority support on the Mississippi Supreme Court for a view consistent with the Fifth Circuit's holding in *Stephens*. *Edwards*, slip op. at 25; *see supra* note 148.

[162] 454 U.S. 814 (1981).

[163] Zant v. Stephens, 456 U.S. 410 (1982) (question certified to Georgia Supreme Court).

[164] The certified question is, "What are the premises of the state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" *Id.* at 413-14. The Georgia Supreme Court's brief response is reported in Zant v. Stephens, 297 S.E.2d 1

torney General of Georgia, curiously muddles the distinction between improper instruction and erroneous fact finding by asking whether the death penalty must be vacated if an aggravating circumstance is "set aside".[165] Respondent Stephens, in contradistinction, couches the question presented explicitly in terms of whether instructing a jury with an unconstitutional aggravating circumstance, upon which the jury will rely, creates an "unacceptable risk" that the death penalty will be improperly imposed.[166] At one extreme, the Court could foreclose the viability of relief for this unconstitutional instruction by holding that as long as another valid circumstance exists, one unconstitutional circumstance is never sufficient error to warrant vacation of the death penalty. At the other extreme, the Court could open a new source of appellate relief by holding that even an erroneous jury fact finding of an aggravating circumstance warrants vacation of a death sentence. Neither of these extreme views will likely muster the necessary five votes; the Court will probably adopt one of two moderate positions. On the one hand, the Court could affirm the Fifth Circuit's holding and extend, subject to the discretion of the reviewing court, protection to include cases in which erroneous jury fact finding of aggravating circumstances could not be considered harmless beyond a reasonable doubt, using the standard enunciated in *Chapman v. California*.[167] On the other hand, the Court could reverse the Fifth Circuit's opinion and hold that the use of an unconstitutional aggravating circumstance does not inevitably undermine the validity of a death sentence, and remand the case for consideration of the specific facts of Stephen's case, leaving the final determination of whether the *Chapman* standard was con-

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(Ga. 1982).

[165] The question presented on certiorari by the Georgia Attorney General is, "When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be set aside because one of these aggravating circumstances is set aside?" Petition for Writ of Certiorari at i, Zant v. Stephens, 454 U.S. 814 (1981).

[166] The question presented by Stephens in opposition to the request for certiorari review is:

> Whether a decision by the Supreme Court of Georgia which declared unconstitutional one of Georgia's statutory aggravating circumstances—one that respondent's jury expressly designated in its sentencing verdict—creates an unacceptable risk that respondent's jury may have recommended his death sentence at least in partial reliance upon that unconstitutional ground?

Brief in Opposition at i, Zant v. Stephens, 454 U.S. 814 (1981).

[167] 386 U.S. 18, 21 (1967) (reversal warranted unless error can be shown to be harmless beyond a reasonable doubt); *see also* Schneble v. Florida, 405 U.S. 427, 432 (1972) (affirming *Chapman*); Harrington v. California, 395 U.S. 250, 254 (1969) (same); Washington v. Watkins, 655 F.2d 1346, 1376 (5th Cir. 1981) (same).

travened to the sound discretion of the appellate court. Either of these two moderate views is consonant with the tenor of the Court's recent decisions in *Lockett* and *Eddings* regarding how circumstances are to be used in sentencing.[168]

Except for the unlikely event that the extreme foreclosure position is adopted by the Court, only the degree of vitality—not the essential significance—of successful challenges to aggravating circumstances (d) and (h) of the Mississippi sentencing scheme will be affected. Retrospective relief will still be available for habeas corpus petitioners to a greater or lesser extent. Even if the extreme foreclosure position was adopted, successful challenges would still remove the unconstitutional influence of these circumstances from future trial situations. Removing this influence can only help to ameliorate the innocuous sentencing results that have occurred thus far in Mississippi.

Tim F. Wilson

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[168] *See supra* note 145.

RECENT DECISIONS

TORTS—MEDICAL MALPRACTICE—LOCALITY RULE REQUIRES THAT PHYSICIANS BE HELD TO STANDARD OF REASONABLY COMPETENT PRACTITIONER IN MISSISSIPPI OR ADJACENT AREA

Plaintiff[1] filed a medical malpractice[2] suit in the Circuit Court of Tishomingo County seeking damages against defendant[3] for negligently treating a severe leg laceration.[4] Plaintiff alleged that because defendant failed to exercise the degree of skill and care required of a physician, amputation of the leg became necessary.[5] Defendant argued that he had exercised the requisite degree of care required by law[6] in diagnosing and treating plaintiff's injury.[7] Defendant maintained that he

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[1] Plaintiff Murphy was a 61 year old logger. King v. Murphy, 424 So. 2d 547, 547 (Miss. 1982).

[2] In D. HARNEY, MEDICAL MALPRACTICE § 3.1, at 88 (1973), medical malpractice is defined as the infliction of injury or death resulting from a failure on the part of the defendant medical practitioner to have complied with appropriate medical standards.

[3] Defendant King is a physician who graduated from the University of Mississippi Medical School in Jackson, Mississippi, and has practiced general medicine in Iuka, Mississippi, since 1958. 424 So. 2d at 548.

[4] *Id.* at 547. Murphy, engaged in a logging expedition, was trimming limbs off a fallen tree when a chainsaw blade caught in a bush and was thrown into the calf area of his left leg, causing a cut 16 inches long and 1-½ inches deep. *Id.*

At the Tishomingo County Hospital, Dr. King examined the wound and performed the following procedures: (1) gave fluids to the patient in an attempt to elevate blood pressure; (2) prescribed Aramine, a vasoconstrictor, in an attempt to reduce blood supply to his extremeties; (3) cleaned and sutured the wound; (4) prescribed Amcill, an antibiotic, when an abnormal white blood count was noticed; (5) ran additional tests when the patient's fever increased; (6) ordered another antibiotic when patient was found to have a temperature of 104.6 degrees, a swollen leg, rapid pulse and blood in the urine. *Id.* at 548.

[5] *Id.* at 549. Murphy was transferred to the Veterans Administration Hospital in Memphis where doctors determined that the infection had become so extensive that amputation was required. Tissue from the leg wound revealed the presence of bacteria known as "gas gangrene." *Id.*

[6] *See infra* notes 74-83 and accompanying text.

[7] 424 So. 2d at 549. The defendant urged the Mississippi Supreme Court to continue its adherance to the rule that provides, "A physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the same neighborhood, in the same general line of practice, ordinarily have and exercise in

had complied with the standard of the medical profession in Tishomingo County[8] and was not guilty of malpractice. Plaintiff offered the testimony of an expert witness from Florida[9] as proof of defendant's negligent treatment.[10] This testimony was admitted by the trial court, which held that the defendant was to be judged according to the standard of care among physicians in similar localities.[11] Judgment was entered on a jury verdict for the plaintiff.[12] On appeal, the Mississippi Supreme Court, *held*, reversed and remanded.[13] The standard of care for a physician shall be that degree of skill and care exercised by a reasonably competent physician in the state and for a reasonable distance adjacent to state boundaries. *King v. Murphy*, 424 So. 2d 547 (Miss. 1982).

A professional is required to exercise the skill of an ordinary member of his profession,[14] and although adherence to custom is some evidence of due care, it is not controlling.[15] Except in medical malpractice

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like cases." *Id; see* Copeland v. Robertson, 236 Miss. 95, 110, 112 So. 2d 236, 241 (1959).

[8] *Id.* at 550. Defendant and three or four other local physicians testified that the treatment and procedures utilized by the defendant in caring for Murphy were proper and in accordance with the standards of the local medical profession. *Id.*

Tishomingo County, where Dr. King practiced, is the northeasternmost county in Mississippi, with a population in 1980 of 18,425. Iuka, the county seat, has a population of 2,847. MISS. SEC'Y OF STATE, MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 1980-1984, at 292, 305.

[9] 424 So. 2d at 550. Dr. Gardner, the expert witness, received his degree from Tufts University Medical School and had practiced in New York, Boston, Illinois, and Florida. At the time of the trial, he was practicing orthopedic surgery in Lee County, Florida, an area with a population exceeding 162,000, and served by four hospitals. *Id.* Dr. Gardner had never practiced in Mississippi, nor had any knowledge of the local medical practices and facilities in Tishomingo County. *Id.* at 550-51.

[10] *Id.* at 550. Dr. Gardner testified that practically every procedure used by Dr. King constituted negligence. He maintained that the wound should not have been sutured, that neither Aramine nor Carbocaine should have been administered, that emergency room equipment was inadequate, that gram stains and cultures should have been taken, that prophylactic antibiotics should have been administered, that a drain should have been inserted, and that the wound should have been left open. *Id.*

[11] *Id.* at 551. The "similar locality" rule requires that general practitioners exercise the degree of skill and care that a general practitioner of ordinary prudence and skill, practicing in the same or similar community would have practiced in similar circumstances. *See infra* notes 45-50 and accompanying text.

[12] *King*, 424 So. 2d at 547. The jury returned a verdict for the plaintiff in the sum of $400,000 damages for loss of his leg, and judgment was entered in that amount. *Id.*

[13] *Id.* at 551. Because Dr. Gardner was not knowledgeable of Mississippi medical custom, the court held that the admission of his testimony constituted reversible error. *Id.*

[14] *See* RESTATEMENT (SECOND) OF TORTS § 299A (1965).

[15] *See* D. HARNEY, *supra* note 2, at 90. The court in The T.J. Hooper, 60 F.2d 737

suits, courts have generally determined what standard of care is required within a particular trade or business.[16] The medical profession has been permitted to set its own standards[17] because of the impracticability of allowing a jury to evaluate highly technical problems and procedures.[18] Juries are also deemed incapable of evaluating the ethical decisions that are of necessity left to the discretion of the physician.[19]

In a medical malpractice suit, as in any negligence action, the plaintiff must prove that the defendant failed to exercise the requisite degree of care.[20] With few exceptions,[21] the standard of care, by which

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(2d Cir.), *cert. denied*, 287 U.S. 666 (1932), reasoned accordingly:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

60 F.2d at 740; *see also* Keeton, *Medical Negligence - The Standard of Care*, 10 TEX. TECH. L. REV. 351, 351-57 (1978) (conformity to custom is merely evidence to be considered by jury).

[16] *See* Marsh Wood Prod. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392, 396 (1932) (trade or business cannot establish its own negligence standard).

In legal malpractice suits, negligence has been found in spite of adherence to customary procedure. *See, e.g.*, Gleason v. Title Guar. Co., 300 F.2d 813, 814 (5th Cir. 1962) (attorney liable for relying on title examination done by abstractor, though practice was customary in area). *But see* State *ex. rel.* Fla. Bar v. Oxford, 127 So. 2d 107, 111-12 (Fla. 1961) (Florida Supreme Court declined to disbar lawyer who filed pleadings for each of opposing parties in 39 divorce suits because practice was customary in locality).

[17] Two commentators have stated, "Although the law has imposed a higher standard of care on doctors, it has tempered the impact of that rule by permitting the profession, as a group, to set its own legal standards of reasonable conduct." Michaud & Hutton, *Medical Tort Law: The Emergence of a Specialty Standard of Care*, 16 TULSA L.J. 720, 722 (1981).

Occasionally, courts have shown a willingness to abandon the medical malpractice custom standard and apply a traditional negligence standard if customary practice is deemed unreasonable and can be evaluated without applying technical medical judgment and learning. *See* Helling v. Carey, 83 Wash. 2d 514, 515 P.2d 981, 983 (1974) (failure to test for glaucoma is negligence as matter of law despite compliance with customary practice); Favalora v. Aetna Casualty and Sur. Co., 144 So. 2d 544, 550 (La. Ct. App. 1962) (radiologist held liable for failing to take known precautions though such precautions were not customarily taken in community); *see also* Comment, *The Role of Custom in Medical Malpractice Litigation*, 55 B.U.L. REV. 647, 653 (1975) (inherent danger in permitting any profession to fix its own standards).

[18] *See* D. HARNEY, *supra* note 2, at 93-94.

[19] *See* Keeton, *supra* note 14, at 354.

[20] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-63 (4th ed. 1971).

[21] Expert testimony has not been required to prove medical malpractice when: (1) a physician's negligence is obvious, even to a layman, *see, e.g.*, Ayers v. Parry, 192 F.2d

a physician's conduct is to be judged, must be established by expert testimony.[22] The standard is generally the degree of skill and care that is commonly exercised by a careful physician of ordinary skill and ability practicing under the same or similar conditions.[23]

181, 184 (3rd Cir. 1951); Atkins v. Humes, 110 So. 2d 663, 666 (Fla. 1959); (2) a particular practice or procedure has been held negligent as a matter of law, *see* Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981, 983 (1974) (ophthalmologist's failure to administer glaucoma test); (3) the doctrine of res ipsa loquitur is available as a basis for proving negligence, *see* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 688-89 (1945) (patient who received arm injury while undergoing appendectomy entitled to rely on doctrine and not required to present expert testimony). *But see* Swerson v. Weber, 57 Cal. 2d 834, 372 P.2d 97, 98, 22 Cal. Rptr. 337 (1962) (whether res ipsa loquitur applies may depend on expert testimony); Brannon v. Wood, 251 Or. 349, 444 P.2d 558, 563 (1968) (same).

[22] Ardoline v. Keegan, 140 Conn. 552, 557, 102 A.2d 352, 355 (1954); *see also* Couch v. Hutchison, 135 So. 2d 18, 23 (Fla. Dist. Ct. App. 1961) (expert witness must establish the standards and practices in a given locality).

Expert testimony traditionally has been required in cases when understanding of the facts is beyond the layman. *See* Ewing v. Goode, 78 F. 442, 444 (C.C.S.D. Ohio 1897) (layman cannot be expected to comprehend specialized art of treating eye cataracts); Fritz v. Horsfall, 24 Wash. 2d 14, 163 P.2d 148, 150 (1945) (jurors have no knowledge of complexities of medical practice).

[23] 5A L. FRUMER, R. BENOIT, M. FRIEDMAN, & L. PILGRIM, PERSONAL INJURY ACTIONS, DEFENSES & DAMAGES § 1.01 [1] [a] (1967); *cf.* Karlson & Erwin, *Medical Malpractice: Informed Consent to the Locality Rule,* 12 IND. L. REV. 653, 654 (1979) (standard is merely the reasonable man standard in which the reasonable man is endowed with skill and knowledge of ordinary physician).

The definition of "ordinary" or "average" has created confusion. *See* Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750, 751 (1897) (defined as the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole). RESTATEMENT (SECOND) OF TORTS § 299A comment e (1965) states:

> [The standard is not that of most highly skilled, nor is it that of the average member of the profession . . . since those who have less than median or average skill may still be competent and qualified. . . . On the other hand, the standard is not that of the charlatan, the quack, the unqualified or incompetent individual who has succeeded in entering the profession . . . .

Formulating a standard of care for the attorney has been particularly difficult. There is no uniform objective standard by which the reasonableness of an attorney's conduct is established. Reasonableness may depend on whether an attorney represents himself as a specialist or on where he practices. *See* Comment, *New Developments in Legal Malpractice,* 26 AM. U.L. REV. 408, 411 (1977); *see also* Wright v. Williams, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975) (specializing attorney held to higher standard of care). *Compare* Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966) (applicable standard of care and skill determined by attorneys in same locality) *and* Ramp v. St. Paul Fire & Marine Ins. Co., 254 So. 2d 79, 82 (La. Ct. App. 1971) (same) *with* Mageary v. Hoyt, 91 Ariz. 41, 369 P.2d 662, 665 (1962) (standard is that of attorney of ordinary skill and ability with no reference to locality) *and* McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 103 (1926) (same).

Although some courts apply an objective standard to an attorney's conduct, others

To encourage small-town practice and to account for the obvious disparities that existed between rural and urban physicians at the turn of the century, courts construed the concept of "similar circumstances" to embrace a particular geographic area.[24] This limitation, known as the locality rule,[25] evolved from the general rule of ordinary skill and care[26] because physicians from remote rural communities had little opportunity for continuing medical education,[27] or for observation of innovative techniques.[28]

The locality rule was established in *Small v. Howard*,[29] when the Supreme Judicial Court of Massachusetts reasoned that because a small-town physician normally did not specialize in surgery and seldom performed difficult operations, he was not bound to possess the high degree of skill possessed by physicians in large cities.[30] The physician was only held to the standard of care observed by other physicians lo-

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adhere to a subjective standard. *Compare* Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864, 865-66 (1961) (attorney must use such skill and diligence as lawyers of ordinary skill commonly possess and exercise) *and* Cochrane v. Little, 71 Md. 323, 18 A. 698, 701 (1889) (lawyer must possess fair, average degree of skill and knowledge) *with* Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144, 146 (1954) (attorney must exercise his best judgment) *and* Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521, 525 (1970) (same).

[24] *See* Note, *The Standard of Skill and Care Governing the Civil Liability of Physicians*, 78 U. PA. L. REV. 91, 96-97 (1929) (holding small-town doctors to urban standards would drive rural practitioners out of practice leaving rural areas without medical care). The locality rule is a purely American doctrine, and the English courts have rejected the notion that the physician's standard might differ from one part of the country to another. *Id.* at 96.

[25] For early indications of the development of a standard of care determined by locality, see Tefft v. Wilcox, 6 Kan. 33, 42 (1870) (court recognized that different localities provide different opportunitites for the medical practitioner) and Smothers v. Hanks, 34 Iowa 286, 289-90 (1872) (standard of skill might vary within a state according to greater or lesser opportunities afforded by particular locality).

[26] *See* 40 FORDHAM L. REV. 435, 437-38 (1971).

[27] Medical education at the turn of the century was not standardized; generally, it consisted of a course of lectures over a period of six months supplemented by apprenticeships. Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729, 732-33 n.16 (1970).

[28] Tefft v. Wilcox, 6 Kan. 33, 42 (1870).

[29] 128 Mass. 131 (1880). Plaintiff alleged mistreatment of a severe wrist laceration and requested that the jury be instructed that the applicable standard of skill was that of the average surgeon in the Commonwealth and not merely in the particular country town. *Id.* at 131-32.

[30] *Id.* at 136. Although application of the locality rule usually operates to limit the standard to which a professional is held, this is not always the case with attorneys. In some instances the locality rule may serve to broaden an attorney's duty; for example, a local attorney might be expected to have greater knowledge of peculiarly local procedures. Comment, *supra* note 23, at 418 n.47.

cated in the same community, locality, or neighborhood.[31] Soon after the doctrine was articulated courts began to experience problems in its application.[32] The locality rule tended to perpetuate localized pockets of substandard health care.[33] Physicians practicing in certain localities were insulated from malpractice liability because of the uniformity of area custom.[34] Furthermore, when a physician was the sole practitioner in a particular community, he was, in effect, immunized from liability.[35] Finally, geographical limitations upon the standard of care often made it difficult for a small-town plaintiff to secure expert testimony because local physicians were reluctant to testify against a colleague.[36]

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[31] 128 Mass. at 136; *see also* Smothers v. Hanks, 34 Iowa 286, 290 (1872) (opportunities afforded by particular locality determinative of appropriate standard); Pike v. Honsinger, 155 N.Y. 201, 209, 49 N.E. 760, 762 (1898) (physician expected to possess degree of skill ordinarily possessed in locality).

The Massachusetts court expressly overruled *Small v. Howard* in 1968 when it adopted a nationwide standard of care for both general practitioners and specialists in Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793, 798 (1968). *See infra* notes 59-62 and accompanying text.

[32] *See infra* notes 33-36 and accompanying text.

[33] Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973, 977 (1967). Because of this tendency, some modern courts have chosen to abolish the doctrine entirely, recognizing that the rule, rather than elevating the quality of medical practice, serves instead to foster substandard care. *See* Morrison v. MacNamara, 407 A.2d 555, 563 (D.C. 1979); Shilkret v. Annapolis Emergency Hosp. Assoc., 276 Md. 187, 349 A.2d 245, 250 (1975).

[34] In Gramm v. Boener, 56 Ind. 497 (1877), the Indiana Supreme Court warned against basing a physician's standard of care on accepted local medical custom when such custom was itself substandard:

> [I]t will not do . . . to say, that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality . . . it will be sufficient.
>
> There might be but few practicing in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them.

Id. at 501.

[35] Pelky v. Palmer, 109 Mich. 561, 67 N.W. 561, 561 (1896).

[36] In Steiginga v. Thron, 30 N.J. Super. 423, 105 A.2d 10, 11 (App. Div. 1954), plaintiff's expert witness declined "on second thought" to testify against "a brother practitioner" even though he continued to maintain that the defendant had been negligent. The court referred to a "shocking unethical reluctance on the part of the medical profession to accept its obligations to society and its profession in an action for malpractice." *Id.; see also* Salgo v. Leland Stanford, Jr., Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170, 175 (1957) (noting near impossibility of obtaining medical witnesses no matter how negligent physician might have been); Morgan v. Rosenberg, 370 S.W.2d 685, 695 (Mo. App. 1963) (expressing concern over medical witness' failure to cooperate). The "conspiracy of silence" is discussed in W. PROSSER, *supra* note 19, at 164; *see also* Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520, 529-33 (1965) (proposing modification of legal rules that perpetuate conspiracy of silence).

In 1916, the Supreme Court of Minnesota, in *Viita v. Dolan*,[37] announced an innovative standard that forecast future trends.[38] The *Viita* court upheld a trial court's jury instruction that a village doctor was required to exercise such care and skill as an ordinary physician would in similar circumstances, with locality merely a circumstance to be considered.[39] The trial court had rejected an instruction based on the standard observed in the locality where the operation had taken place.[40] The improvements in transportation and communications, the frequent meetings of medical societies, the more widespread use of medical journals, and the greater opportunities for hospital work had placed the country doctor on a more equal footing with his city colleagues.[41] Concern for the isolated rural practitioner generally remained strong,[42] however, and by mid-century only a few other jurisdictions had followed the lead of the Minnesota court.[43]

Other jurisdictions, responding to the problems of the locality rule, expanded their definition of "same community."[44] In an attempt to

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[37] 132 Minn. 128, 155 N.W. 1077 (1916).

[38] Comment, *Standard of Care for Medical Practitioners—The Locality Rule*, 14 S.D.L. REV. 349, 351 (1969). Although considered premature at the time, the *Viita* court's rationale was adopted later by other courts. *See* cases cited *infra* notes 43, 85, and accompanying text.

[39] 155 N.W. at 1081.

[40] *Id.* at 1080-81.

[41] *Id.* at 1081; *see also* W. PROSSER, *supra* note 20, at 164 (strict locality rule no longer necessary in modern medical practice).

[42] *See, e.g.* Parrish v. Spink, 284 Ala. 263, 224 So. 2d 621, 623 (1969); Loftus v. Hayden, 391 A.2d 749, 752 (Del. Super. Ct. 1978); Hansen v. Isaak, 70 S.D. 529, 19 N.W.2d 521, 522 (1945); Pepin v. Averill, 113 Vt. 212, 32 A.2d 665, 668 (1943).

[43] *See, e.g.*, McGulpin v. Bessmer, 43 N.W.2d 121, 128 (Iowa 1950); Josselyn v. Dearborn, 143 Me. 328, 62 A.2d 174, 180 (1948); Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338, 344 (1939).

[44] *See* Gist v. French, 136 Cal. App. 2d 247, 288 P.2d 1003, 1017-18 (1955) ("same community" means area governed by same laws and sovereign, that is entire 48 states); Fitzmaurice v. Flynn, 167 Conn. 609, 356 A.2d 887, 892 (1975) (entire state); Tallbull v. Whitney, 172 Mont. 326, 564 P.2d 162, 166 (1977) (similar localities within state of Montana); *cf.* Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940) (negligence found for failure to refer patient to bone specialist in nearby city; locality extended to readily accessible medical centers).

In *Tallbull*, the Montana Supreme Court voiced a need to continue standard differentiation between out-of-state metropolitan areas and in-state rural areas while eliminating all intrastate differentiation. 564 P.2d at 166. The court found four reasons to support its decision to abolish intra-state distinctions. First, because of modern transportation systems, the rural physician is no longer isolated from those practicing in more populous areas of the state. Second, low neighborhood standards often constitute negligence per se. Third, a conspiracy of silence often prevented the securing of expert testimony. Finally, the elimination of in-state distinctions would provide incentive for rural

counteract the "conspiracy of silence," courts began to permit expert witnesses from similar communities to testify concerning the relevant standard of care in the defendant's community.[45] This development in turn engendered new problems of interpretation as courts attempted to define "similar community." Early cases interpreted similarity in terms of geographic proximity.[46] Other courts measured similarity in terms of size, population, economy, and average income.[47] More recently, courts have looked at the similarity of available medical resources when comparing localities.[48] In *Gambill v. Stroud*,[49] the Arkansas Supreme Court said that the similarity of communities should depend not upon population or area but rather upon similarity of medical facilities, practices, and advantages.[50] This approach has been considered a step toward the establishment of a nationwide uniform standard of care by which to judge the medical practitioner.[51] The Georgia Court of Appeals, in

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areas to improve their medical care. *Id.* at 164-66.

[45] *See, e.g.*, White v. Mitchell, 263 Ark. 787, 568 S.W.2d 216, 219-21 (1978); Kwak v. St. Anthony DePadua Hosp., 54 Ill. App. 3d 719, 369 N.E.2d 1346, 1351 (1977); Benzmiller v. Swanson, 117 N.W.2d 281, 287 (N.D. 1962); Schenck v. Roger Williams General Hosp., 382 A.2d 514, 519 (R.I. 1977).

[46] In Warnock v. Kraft, 30 Cal. App. 2d 1, 85 P.2d 505, 506 (Dist. Ct. App. 1938), the testimony of a Los Angeles physician was admitted against a Pasadena surgeon. The court reasoned that because the two cities were contiguous and were both served by the same general hospital, they were similar. *Id.* at 506; *see also* Sales v. Bacigalupi, 47 Cal. App. 2d 82, 117 P.2d 399, 401-02 (1941) (close proximity of Oakland to San Francisco make the two communities similar); Allen v. Voje, 114 Wis. 1, 89 N.W. 924, 931 (1902) (Milwaukee physicians qualified to testify about standard of care in town 30 miles away).

[47] *See* Michael v. Roberts, 91 N.H. 499, 23 A.2d 361, 362 (1941) (size of communities determines similarity); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669, 672 (1956) (metropolitan centers not dissimilar); Morrill v. Komasinski, 256 Wis. 417, 41 N.W.2d 620, 623 (1950) (communities of comparable size in nearby states are similar).

[48] *See* Tallbull v. Whitney, 172 Mont. 326, 564 P.2d 162, 166 ("similar-locality-in-Montana" rule refers to similarity of size, location, and character in medical context); Niblack v. United States, 438 F. Supp. 383, 387 (D. Colo. 1977) (proof of malpractice requires evidence of the standard of care in the area's medical community).

[49] 258 Ark. 766, 531 S.W.2d 945 (1976).

[50] *Id.* at 948. The court affirmed a judgment for defendant, a Jonesboro surgeon. *Id.* at 951. In upholding a jury instruction that referred to the "same or similar locality," the court noted that although a locality could extend beyond a city to embrace a much larger area, depending on the circumstances of the case, locality remained a relevant consideration. *Id.* at 948-50. Commenting on the practicality of a nationwide standard, the court said, "[H]owever desirable the attainment of this ideal may be, it remains an ideal. . . . [W]e are not convinced that we have reached the time when . . . postgraduate medical education, research and experience is equally available to all physicians, regardless of the community in which they practice." *Id.* at 948.

[51] *See* Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408, 411, 415 (1969) (definition of similar locality in

Murphy v. Little,[52] demonstrated an alternative approach toward the elimination of the locality rule. A general surgeon was sued for malpractice for improperly applying a cast to a broken limb.[53] By Georgia statute, the doctor was required to exercise a reasonable degree of care and skill.[54] The court, holding that the requirement of reasonable care was not, in this instance, circumscribed by locality, stated that for common and simple medical procedures, certain nationwide minimum standards applied.[55] Other courts likewise permitted expert testimony without regard to locality when a plaintiff could establish the existance of a nationwide medical standard.[56]

Widespread judicial recognition of a general nationwide standard of care irrespective of geographical considerations occurred first in cases involving specialists.[57] The medical profession itself adopted a national standard for membership in many of its certified specialities.[58]

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medical terms forecasts adoption of national standard). *But cf. Gambill*, 531 S.W.2d at 948 (nationwide standard remains mere ideal).

[52] 112 Ga. App. 517, 145 S.E.2d 760 (1965).

[53] 145 S.E.2d at 761. The court ruled that it was error to exclude the testimony of an orthopedist because the orthopedist was not familiar with medical custom in the area. *Id.* at 763-64.

[54] GA. CODE § 84-924 (1955) (recodified at GA. CODE ANN. § 51-1-27 (1982)).

[55] 145 S.E.2d at 764. The court stated, "There are doubtless areas of medicine where knowledge of proper treatment is limited geographically by prevalence of the disease or by reason of special facilities for study, but the human race has suffered from broken bones for so long as it has been in existence." *Id.*

[56] *See, e.g.*, McElroy v. Frost, 268 P.2d 273, 279 (Okla. 1954) (defendant charged with knowledge of minimum acceptable nationwide standards for x-ray procedures); Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972) (locality rule could not be used to permit proliferation of standards for administering anesthesia below a universal minimum); Hundley v. Martinez, 151 W. Va. 1013, 158 S.E.2d 159, 169 (1967) (defendant charged with knowledge of standardized nationwide procedure for removal of cataracts).

[57] In Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970), the court imposed a national standard upon specialists. Reasoning that the reliance of the public upon the specialist's skills is independent of geographical considerations, the court concluded that any non-national standard for the specialist would defeat the expectations and purpose of a speciality. 180 N.W.2d at 791; *see also* Kronke v. Danielson, 108 Ariz. 400, 499 P.2d 156, 159 (1972) (one who holds himself out as specialist held to standard of care applicable to other specialists regardless of locality); Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288, 302 (1970) (locality rule may have validity for general practitioner but is no defense for specialist who is held to national standard); Bruni v. Tatsumi, 46 Ohio St. 2d 127, 346 N.E.2d 673, 679 (1976) (geographical considerations control neither the specialist's standard of care nor the qualification of expert testimony).

[58] R. STEVENS, AMERICAN MEDICAL AND PUBLIC INTEREST 534-35 n.8 (1971). As of 1970, 25 states had adopted examinations produced by the Federation of State Medical Boards for use by individual state licensing boards. *Id.* Scores are reported so that they may be compared from state to state. *Id.; see also* Holden, *Speciality Board Certifica-*

The landmark case abolishing the locality rule for specialists was *Brune v. Belinkoff.*[59] In reversing a jury instruction, which stated that the defendant anesthesiologist should be held to a local standard, the Supreme Judicial Court of Massachusetts explicitly overruled *Small v. Howard.*[60] Although the case involved an action against a specialist, the court applied its new standard to both specialists and general practitioners[61] reasoning that the locality rule was unsuited to modern-day medical conditions.[62]

In a malpractice action against a general practitioner, the Supreme Court of Washington in *Pederson v. Dumouchel,*[63] rejected the locality rule as a binding principle, finding that a limitation of the standard of care to a particular locality was no longer proper.[64] The *Pederson* court

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tion as a Measure of Professional Competence, 213 J.A.M.A. 1016, 1016 (1970) (because of standardized requirements for education and certification in speciality areas and prevalence of specialist societies and journals, specialist practice is similar regardless of locality).

For the effect of attorney specialization on the applicable standard of care, see Wright v. Williams, 47 Cal. App.3d 802, 810, 121 Cal. Rptr. 194, 199 (attorney specializing in maritime law held to the standard of all such specialists); Childs v. Comstock, 69 App. Div. 160, 165, 74 N.Y.S. 643, 646-48 (1902) (specializing attorney held to higher standard of care). *Contra* Olsen v. North, 276 Ill. App. 457, 475 (1934) (attorney who held himself out as specialist only required to exercise degree of skill of ordinary attorney).

[59] 354 Mass. 102, 235 N.E.2d 793 (1968). A malpractice suit was brought against an anesthesiologist for allegedly administering an excessive dosage of spinal anesthetic. Defendant contended that in his community, the dosage he administered was customary. 235 N.E.2d at 795.

[60] 235 N.E.2d at 798.

[61] *Id.* Concluding that the locality rule had caused a "balkanization" of medical standards, the court announced:

> [In medical malpractice actions,] the proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances of his profession . . . .
>
> One holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practicing the speciality . . . . And, as in the case of the general practitioner, it is permissible to consider the medical resources available to him.

Id.

[62] *Id.*

[63] 72 Wash. 2d 73, 431 P.2d 973 (1967). A malpractice action was brought against a doctor, a dentist, and a hospital for brain damage suffered by plaintiff while he was anesthetized during surgery. 431 P.2d at 975. The court held that a jury instruction that defined the standard of care by the locality rule was prejudicial error. *Id.* at 978.

[64] *Id.* at 978. The court abandoned the locality rule and emphasized that the present-day medical practitioner, unlike his nineteenth-century counterpart, has every op-

did not abandon all considerations of locality for the general practitioner,[65] but in *Douglas v. Bussabarger*,[66] one year later, the court's shift to a standard based on proficiency rather than locality was complete. In *Douglas*, the Washington Supreme Court again reversed a jury instruction and held that community custom was no longer a consideration for determining the applicable standard of care for a physician.[67] Although valid concerns had supported the locality rule in the past, the tremendous advances in transportation and communication and the vastly improved opportunities for post-graduate familiarization with recent developments in medical science had rendered the locality rule unnecessary.[68]

In light of modern medical standards, superior and standardized medical training, advanced communication and transportation systems, and the increased availability of clinical facilities, the locality rule has been criticized as unjustified and irrelevant in the modern medical setting.[69]

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portunity to keep abreast of advances made in the profession. *Id.* at 977. The court parenthetically noted "that the law of this jurisdiction has never recognized a difference in the professional competency of a lawyer in a small community from that of the professional competency required of a lawyer in a large city." *Id.*

[65] Despite its reservations about the locality rule, the *Pederson* court settled on a standard based on the level of proficiency established in the area served by medical facilities readily accessible to the patient. *Id.; see also* Waltz, *supra* note 51, at 418 (*Pederson* court back-tracked by retaining rule based on geography).

[66] 73 Wash. 2d 476, 438 P.2d 829 (1968).

[67] *Id.* 438 P.2d at 838. The court exposed the absurdity of the locality rule in an oft-quoted passage:

> When patients considering operations approach doctors in Raymond, the doctors do not admit that they can be a little more careless and act with less responsibility than can doctors in Olympia, who can be a little more negligent than doctors in Tacoma, who can be a little more negligent than doctors in Seattle, who can be considerably more negligent than doctors in New York City.

Id.

[68] *Id.* The only jurisdiction that has never applied any type of locality rule is New Jersey. *See* Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680, 683 (1953) (general practitioner from New York, unlicensed in New Jersey and retired for twenty years, qualified to testify about standard of care; no mention of locality); *see also* Nations & Surgent, *Medical Malpractice and the Locality Rule*, 14 S. Tex. L.J. 129, 137-38 (1973) (no need for locality rule in New Jersey since most of its population is close to major urban medical centers).

[69] Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245, 252 (1975).

Criticism of the locality rule has been widespread among commentators who perceive an ever-widening gap between medical standards generally recognized by the profession throughout the country and the legal standard that physicians are actually held

The trend has been toward the adoption of a national standard of care for physicians, with locality and availability of facilities merely being circumstances for consideration by the jury.[70] Some states have modified or eliminated the locality requirement by statute.[71] Despite extensive criticism, however, a number of jurisdictions have continued to follow the locality rule,[72] which has never been without support from some legal scholars.[73]

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accountable under because of the locality rule. *See, e.g.*, D. HARNEY, *supra* note 2, at 100-01; D. LOUISELL & H. WILLIAMS, THE PARENCHYMA OF LAW 183 (1960); Michaud & Hutton, *supra* note 17, at 720, 730; Waltz, *supra* note 51, at 419-20.

[70] *See, e.g.*, Speed v. State, 240 N.W.2d 901, 907-08 (Iowa 1976); Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970); Shilkret v.Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 349 A.2d 245, 252 (1975); Shier v. Freedman, 58 Wis. 2d 269, 206 N.W.2d 166, 170-71 (1973).

[71] *E.g.*, ARIZ. REV. STAT. ANN. § 12-563 (1982) (degree of care, skill, and learning expected of member of profession in the state, under same or similar circumstances); VA. CODE § 8.01-581.12:1 (1977) (same, but standard may be based on same or similar locality if more appropriate). *See generally* B. SHARTEL & M. PLANT, THE LAW OF MEDICAL MALPRACTICE § 3-17 at 132 (1959) (discussion of statutory modification in medical malpractice area).

A few states have enacted legislation allowing the admissibility of medical textbooks and treatises as substitutes for expert testimony. *E.g.*, MASS. GEN. LAWS ANN. ch. 233, § 79-c (West 1959 & Supp. 1981). Other states' statutes require plaintiffs to submit medical malpractice claims to review panels for their expert opinions prior to bringing suit. *E.g.*, LA. REV. STAT. ANN. § 40:1299.47 (West. 1977 & Supp. 1982); VA. CODE §§ 8.01-581.2 to -581.11 (1977 & Supp. 1982); *see also* R. LONG, THE PHYSICIAN AND THE LAW 79 (1968) (use of screening panels in several states); 39 LA. L. REV. 305, 310 (1978).

[72] *See* Parrish v. Spink, 284 Ala. 263, 224 So. 2d 621, 623 (1969) (same general neighborhood); Loftus v. Hayden, 391 A.2d 749, 752 (Del. Super. Ct. 1978) (expert must know degree of skill ordinarily employed in community).

The use of the locality rule to exclude non-local expert witnesses appears to enjoy continued support in cases of legal malpractice, in which standards of practice arguably are more heavily influenced by local custom. *See* Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1968) (attorney who pronounced title marketable according to local standard not negligent, though title would have been unmarketable in another community); Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App. 1966) (non-local expert not qualified to testify whether failure to join all defendants in personal injury suit constituted negligence). Jurisdictions that apply a locality rule to the standard for attorneys usually define the locality as the entire state. Presumably, one who passes the state bar examination is competent to practice law throughout the entire state. *See* Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865, 866 (1968).

[73] Karlson and Erwin admit that greater opportunities for rural physicians to remain current in their field are now available, but argue that the quality of practice in rural areas may be affected by circumstances beyond the physician's control. They suggest that little is known about the quality of medical services in any area and note that fewer health care workers are available in rural areas. Karlson & Erwin, *supra* note 23, at 663.

In Mississippi, the locality rule was first enunciated in the 1959 case of *Copeland v. Robertson*,[74] in which a physician was charged with malpractice for negligently performing a hysterectomy.[75] After discussing the general standard of skill and care required of the physician,[76] the court determined that a doctor was required to exercise the degree of reasonable skill and diligence held by physicians in the same neighborhood.[77] The court also declared that the standard could only be established by expert testimony unless the issue was within the common knowledge of laymen.[78]

The locality rule remained unchallenged in Mississippi until 1971.[79] In *Dazet v. Bass*,[80] the Mississippi Supreme Court considered a plaintiff's argument that the locality rule was no longer valid.[81] Conceding that the argument was persuasive,[82] the court concluded that the issue of the rule's validity was not properly before it.[83]

In the instant case, the court recognized that the strict locality

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[74] 236 Miss. 95, 112 So. 2d 236 (1959).

[75] *Id.* at 103-09, 112 So. 2d at 238-40. The court affirmed a verdict in favor of the plaintiff, finding no merit in the defendant's objections to jury instructions framed according to the traditional locality rule. *Id.* at 112, 112 So. 2d at 242.

[76] *Id.* at 110, 112 So. 2d at 241; *cf.* Sanders v. Smith, 200 Miss. 551, 559, 27 So. 2d 889, 891 (1946) (physician not warrantor against bad results).

[77] 236 Miss. at 110, 112 So. 2d at 241. Although silent on the subject of specialists generally, the court added that suits involving surgeons were subject to the locality rule. *Id.*, 112 So. 2d at 241.

[78] *Id.*, 112 So. 2d at 241. In contrast, an action for legal malpractice in Mississippi has never been dependent upon a demonstration of a local standard by an expert witness. *See* Comment, *Legal Malpractice*, 43 Miss. L.J. 691, 693 (1972) (expert testimony not required to make prima facie case against a lawyer for malpractice). *See generally* Wade, *supra* note 14, at 766 (no requirement of expert testimony appears to have developed in actions against attorneys). For this reason, no Mississippi Supreme Court case has turned on the applicability of the locality rule. Comment, *supra*, at 693. It would appear from dicta in the 1966 case of Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966), that locality may be a consideration in determining a proper standard of care for an attorney. In *Thompson*, breach of a duty to a client was described as a failure to exercise the degree of care and skill exercised by attorneys in practice in the jurisdiction. *Id.* at 757-58; *see also supra* note 72.

[79] *See* Hill v. Stewart, 209 So. 2d 809, 812 (Miss. 1968) (same neighborhood standard applied); DeLaughter v. Womack, 250 Miss. 190, 206, 164 So. 2d 762, 766 (1964) (same).

[80] 254 So. 2d 183 (Miss. 1971).

[81] *Id.* at 187. The plaintiff argued that the standardization of medical education and training negated the underlying assumption of the locality rule. *Id.*

[82] *Id.*

[83] *Id.* at 187-88. The plaintiff had failed to make an offer of proof when the trial judge refused to admit the testimony of the plaintiff's expert, a New Orleans physician, concerning the standard of care among physicians in Jackson. *Id.* at 187.

rule no longer applies to the modern-day malpractice case. Relying largely on the plaintiff's reasoning in *Dazet*,[84] the court determined that because physicians generally receive the same standardized education and training,[85] and because geographic considerations play no part in the certification of specialists,[86] the rule should be expanded.[87] The court, however, noted that the rule is followed, in some form, in many jurisdictions[88] and because it has been a firmly established element of the physician's standard of care in Mississippi,[89] it should not be entirely abolished.[90] Further, because the geographical area from which a standard is drawn has been expanded beyond the state's boundaries,[91] an expert witness need not practice in the state nor be familiar with the medical standards peculiar to an individual community.[92] But the court also reasoned that because the rule has not been totally abolished, an expert witness must demonstrate that he is familiar with the Mississippi standard.[93]

The strict locality rule is an anachronism.[94] It has no place in a contemporary medical context,[95] and has served to unduly handicap

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[84] *See supra* note 81.

[85] King v. Murphy, 424 So. 2d at 550; *see supra* notes 68-69 and accompanying text.

[86] 424 So. 2d at 550. National boards dictate the length of residency requirements, subjects covered, and exams to be given, evidencing the national standardization of speciality practice. Holden, *supra* note 58, at 1016.

[87] *King*, 424 So. 2d at 550.

[88] The opinion states that 23 jurisdictions follow the locality rule. 424 So. 2d at 549; *see supra* notes 42, 45-50, 72, and accompanying text.

[89] 424 So. 2d at 549; *see also Dazet*, 254 So. 2d at 187; Hill v. Stewart, 209 So. 2d 809, 812 (Miss. 1968); DeLaughter v. Womack, 250 Miss. 190, 206, 164 So. 2d 762, 766 (1964); *Copeland*, 236 Miss. at 110, 112 So. 2d at 241.

[90] *King*, 424 So. 2d at 550. Instead, the court held that the standard of care for physicians, surgeons, and specialists, was the standard observed by reasonably prudent practitioners in the state and in reasonably adjacent areas. *Id.*

[91] *Id.*; *see supra* note 90.

[92] *King*, 424 So. 2d at 550.

[93] *Id.* The court was of the opinion that Dr. Gardner did not qualify under the locality rule, the similar locality rule, or the new rule that was adopted. The admission of his testimony by the lower court was reversible error. *Id.* at 551.

On petition for rehearing, Justice Hawkins, joined by Justice Bowling, dissented from the new rule and the reversal of the lower court judgment. *Id.* at 551-53. Justice Hawkins contended that any rule based on locality not only lacked vitality in the modern medical world, *see supra* notes 63-71 and accompanying text, but also was inconsistent with the more liberal rules that the court had applied to the qualification of experts on other matters. 424 So. 2d at 551-52.

[94] *See supra* notes 26-28 and accopmpanying text.

[95] *See, e.g.*, Shilkret v. Annapolis Emergency Hosp. Ass'n., 276 Md. 187, 349 A.2d 245, 252 (1975); *Brune*, 235 N.E.2d at 798; *Pederson*, 431 P.2d at 978; *see supra* notes

plaintiffs in medical malpractice cases.[96] With the expansion of the geographic scope of the medical practitioner's standard of care to include major medical centers such as Jackson, Memphis, and possibly New Orleans,[97] the "conspiracy of silence"[98] is no longer an insurmountable obstacle to a plaintiff's chances of prevailing. This geographical expansion should encourage interaction between the rural practitioner and his urban counterpart who has easier access to the latest medical technology. Because both practitioners are held to the same duty of care, standardization of medical practice will be promoted, and the problem of substandard health care in isolated areas may be alleviated.[99]

The Mississippi Supreme Court's response to the growing irrelevancy of the locality rule is an uncommon one. Only a few other jurisdictions have adopted statewide standards.[100] Although the court's stated rationale for this particular standard is minimal, logic dictates that the qualifications of a physician depend not upon the locality in which he chooses to practice but upon the education and training that he has received. Because there is only one medical-education facility in Mississippi, a considerable degree of statewide standardization seems inescapable. Defining the "same community" as an entire state for purposes of the locality rule has been regarded by at least one commentator as progressive.[101] For a predominately rural state,[102] Mississippi's approach is an innovative compromise between the application of many isolated standards and the imposition of one uniform standard.

68-80 and accompanying text.

[96] *See supra* note 36.

[97] *See King*, 424 So. 2d at 550 (geographical limits extend for a reasonable distance adjacent to state boundaries). Whether New Orleans or other centers will be considered within a reasonable distance adjacent to state boundaries is not answered.

[98] *See supra* note 96.

[99] *See supra* notes 33, 34 and accompanying text.

Although the expanded standard alleviates certain problems, some commentators suggest that a new difficulty arises. Dean Keeton argues that so-called "defensive medicine" and an increase in medical insurance costs result from a relaxation of the locality rule. According to this view, liberalization of expert-witness requirements leads to increased litigation and more findings of negligence. This causes insurance rates to rise and doctors to take many unnecessary and expensive precautions in an effort to minimize liability. Keeton, *supra* note 15, at 359-63.

[100] *See supra* notes 44, 71.

[101] *See* Waltz, *supra* note 43, at 411 (noting that adoption of statewide standards is "ahead of its time").

[102] Mississippi had a total population of 2,503,250 in 1980, according to preliminary census figures. MISS. SEC'Y OF STATE, MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 1980-1984, at 305. Of this figure, only 782,142 lived in 27 cities with populations over 10,000. *Id.* at 285-304.

Although the average in-state physician may not have the facilities or technical knowledge available to warrant imposition of a national standard for complex treatments, he certainly should be held to a uniform standard when simple and common procedures are at issue.[103] Furthermore, a strong argument can be made for the application of a separate nationwide standard for the specialist,[104] and it is hoped that should the issue present itself, the Mississippi Supreme Court will make the necessary distinction. The instant decision is a welcome one because it liberates the medical malpractice suit from the standards of the late nineteenth century. As the medical profession acknowledges this evolution, so should the law.

Alissa Allison Jacobs

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[103] *See* discussion of uniform minimum standards, *supra* notes 55-56 and accompanying text.

[104] *See supra* notes 57-58 and accompanying text. In Mississippi, as of 1968, more than 50 percent of all specialists were certified by their respective American Boards as having met minimum national standards. In Pathology, 78 percent were certified and in Radiology and Neurological surgery, close to 70 percent were certified. 43 MISS. L.J. 587, 591 (1972). Furthermore, a Mississippi Medical Association study demonstrates that the standards of the specialist should be distinguished from that of the general practitioner. MISSISSIPPI MEDICAL ASS'N, PROFILE OF ATTAINMENT—MEASURE OF NEED: A STUDY OF POST GRADUATE MEDICAL EDUCATION IN MISSISSIPPI 35 (1968).

Constitutional Law—Due Process—In Personam Jurisdiction Over a Nonresident Corporation in a Suit by a Nonresident Plaintiff on a Foreign Cause of Action Is Not Violative of Due Process If Defendant Is Amenable to Process Within The State

Plaintiff,[1] a Texas resident, filed a wrongful death claim against a nonresident corporation[2] in the United States District Court for the Southern District of Mississippi.[3] The claim arose from a 1975 automobile accident in Texas,[4] but the plaintiff failed to file the action until 1981, three years after the applicable Texas statute of limitations had expired.[5] The defendant moved to dismiss the suit,[6] alleging that the exercise of jurisdiction by the Mississippi court would violate the defendant's procedural due process rights.[7] The defendant contended that the appointment of an agent for service of process[8] in Mississippi was insufficient to force it to defend against an out-of-state plaintiff on a cause of action that had no connection with the state.[9] The district court granted the motion to dismiss, reasoning that the forum state's lack of interest in the litigation allowed the judge discretion to decline jurisdiction over the case.[10] On appeal, the United States Court of Appeals for the Fifth Circuit, *held*, reversed. No violation of due process occurs when a state exercises in personam jurisdiction over a foreign

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[1] Plaintiff, Mary Ezell Cowan, brought suit to recover for the death of her husband, Earl Cowan. The claim was filed both individually and on behalf of the heirs at law of Earl Cowan. Cowan v. Ford Motor Co., 694 F.2d 104, 105 (5th Cir. 1982).

[2] *Id.* The defendant, Ford Motor Company, was incorporated in Delaware, and its principal place of business was in Michigan. *Id.* at 105-07.

[3] *Id.* at 104.

[4] *Id.* at 105.

[5] *Id.* The Texas wrongful death statute of limitations provides a two year period within which to bring a claim. Tex. Rev. Civ. Stat. Ann. art. 5526(7) (Vernon 1958).

[6] 694 F.2d at 105.

[7] *Id.* at 106-08.

[8] *Id.* at 107. Ford, as a foreign corporation authorized to do business within the state, was required under Mississippi law to appoint and maintain an agent within the state for service of process. *See* Miss. Code Ann. § 79-3-225 (1972). Ford's agent could be served with any process, notice, or demand required or permitted by law to be served upon the corporation. *See id.* § 79-3-229. Mississippi law provides that a foreign corporation doing business in the state is subject to suit in Mississippi to the same extent as a domestic corporation, whether the cause of action accrued in the state or not. *Id.* § 79-1-27.

[9] 694 F.2d at 107.

[10] *Id.* at 105.

corporation being sued by a nonresident plaintiff on a cause of action that arose in another state if the corporation is amenable to process in the forum state, and the court may not decline jurisdiction under these circumstances. *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982).

The conflict between the exercise by state courts of in personam jurisdiction over nonresidents and the due process clause was first considered by the United States Supreme Court in 1877 in *Pennoyer v. Neff*.[11] In *Pennoyer*, a nonresident defendant was subjected to in personam jurisdiction by an Oregon state court solely because of his ownership of real property within the state.[12] The Supreme Court reversed the state court's assertion of jurisdiction,[13] stating that a state court's authority is necessarily limited by the state's boundaries, and that any expansion of authority beyond those limits would be an unconstitutional exercise of power.[14] The Court also reasoned that the fourteenth amendment's due process clause prohibits a state court from determining the personal rights and obligations of parties over whom that court had no jurisdiction.[15] The only methods by which a state could obtain valid in personam jurisdiction over a nonresident defendant were by service of process on the defendant within the state or by the defendant's voluntary appearance in court.[16] After *Pennoyer*, assertion of in personam jurisdiction by a state court was based on a highly territorial conception of the state's authority.[17]

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[11] 95 U.S. 714 (1877).

[12] *Id.* at 719. The defendant was served with process by publication pursuant to Oregon law. *Id.* at 719-20. The defendant's failure to appear resulted in a default judgment, followed by the judicial sale of the property. *Id.* at 720.

[13] *Id.* at 733. The Court determined that constructive service of process against a nonresident defendant was totally ineffective to establish in personam jurisdiction. *Id.* at 727. The Court limited the holding in *Pennoyer* to in personam jurisdiction, thus allowing a state to exercise in rem jurisdiction over a nonresident by using publication as service of process. *Id.* at 733. Service by publication is proper for in rem actions because the land that is the basis of the suit is within the boundaries of the state. *Id.* at 727.

[14] *Id.* at 720. The Court reasoned that because each state has equal dignity and authority, one state cannot directly affect persons or property outside that state without encroaching upon the sovereignty of another state. *Id.*

[15] 95 U.S. at 733.

[16] *Id.* The *Pennoyer* Court, however, left undefined the meaning of "presence" of a person or property within a state. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.13, at 630 (2d ed. 1977) (*Pennoyer* holding insufficient to establish clear legal standards for in personam jurisdiction). See generally Note, *Jurisdiction: The Outer Limits of Minimum Contacts*, 11 STETSON L. REV. 82, 86 (1981) (presence standard of *Pennoyer* unworkable due to lack of guidelines).

[17] *See* McDougall, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 2 (1982).

The Mississippi Supreme Court began a similar analysis of the interrelationship between due process and in personam jurisdiction twenty years after *Pennoyer*. In *Pullman Palace-Car Co. v. Lawrence*,[18] an out-of-state plaintiff sued a nonresident defendant on a cause of action that arose outside Mississippi.[19] The Mississippi Supreme Court held that the assertion of jurisdiction by the lower court was not violative of due process.[20] The *Pullman* court explained that due process requirements are satisfied when the court has subject matter jurisdiction and obtains jurisdiction over the party by voluntary appearance or service of process.[21] In a 1917 case, *Vicksburg, S. & P.R. v. Forcheimer*,[22] which presented a jurisdictional issue similar to *Pullman*,[23] the Mississippi Supreme Court affirmed the circuit court's assumption of jurisdiction[24] under the state consent statute, which gave state courts subject matter jurisdiction over any cause of action against a foreign corporation conducting business in the state, regardless of where the cause of action arose.[25] The exercise of jurisdiction, therefore, was not a violation of the fourteenth amendment.[26]

Pennoyer's requirement of a defendant's "presence" within a state's boundaries for in personam jurisdiction was modified when the United States Supreme Court decided *International Shoe Co. v.*

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[18] 74 Miss. 782, 22 So. 53 (1897).

[19] *Id.* at 791, 22 So. at 54. The plaintiff, a resident of Illinois, sued the defendant, claiming that he was assaulted by the defendant's employee while aboard the defendant's train, which allegedly was still in Illinois. *Id.* at 791-92, 22 So. at 53-54.

[20] *Id.* at 810, 22 So. at 60.

[21] *Id.* at 797, 22 So. at 55. The *Pullman* court cited as primary authority for its holding New Orleans, J. & G. N.R.R. v. Wallace, 50 Miss. 244, 248 (1874), the first Mississippi case to hold that an in personam action could be brought against a foreign corporation on a cause of action that arose outside Mississippi. 74 Miss. at 797, 22 So. at 55.

The court in *Pullman* also relied on three cases decided after *Wallace*, each of which dealt with a nonresident plaintiff who sued on an out-of-state cause of action. The court upheld the in personam jurisdiction of the lower court in each case without discussing the residence of the plaintiff. *See* McMaster v. Illinois Cent. R.R., 65 Miss. 264, 271, 4 So. 59, 61 (1887); Illinois Cent. R.R. v. Crudup, 63 Miss. 291, 298-99 (1885); Chicago S. & N.O.R.R. v. Doyle, 60 Miss. 977, 983-84 (1883).

[22] 113 Miss. 531, 74 So. 418 (1917).

[23] *Id.* at 536-37, 74 So. at 419-20. The plaintiff was a resident of Illinois, and the defendant was a Louisiana corporation who had an agent and an office in Vicksburg, Mississippi, and conducted interstate business between Vicksburg and points in Louisiana. *Id.*

[24] *Id.* at 541, 74 So. at 420.

[25] Ch. 77, 1892 Miss. Laws 279 (current version at MISS. CODE ANN. § 79-1-27 (1972)).

[26] 113 Miss. at 539-40, 74 So. at 419-20.

Washington[27] in 1945. The question presented by *International Shoe* concerned in personam jurisdiction asserted over a nonresident corporation that had limited dealings with the forum state.[28] The Court construed *Pennoyer* to mean that in personam jurisdiction over a nonresident who was not present within the territory of the forum existed only if he had sufficient minimum contacts with the state.[29] Thus, the concept of minimum contacts supplanted the notion that the actual physical presence of the defendant within the forum state was necessary to impose in personam jurisdiction. The term "presence" would now be used to represent the quantum of contacts or activities the nonresident defendant must have with the forum state to satisfy due process requirements.[30] In addition, the minimum contacts had to be such that a suit based on them would not offend "traditional notions of fair play and substantial justice."[31] The Court noted that there would be instances when the nature of the contact might be so continuous and

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[27] 326 U.S. 310 (1945). In *International Shoe*, the State of Washington sued a nonresident corporation to recover unpaid contributions to the state unemployment fund, which was organized and administered by the state. The failure of an employer to contribute to the fund gave rise to personal liability. *Id.* at 311-12.

[28] *Id.* at 315. The defendant, a Delaware corporation with its principal place of business in St. Louis, Missouri, did not have an office in the State of Washington, nor did it make contracts for either the sale or purchase of merchandise there; its only contact with Washington was through 13 salespersons who were under the direct supervision of the St. Louis office. These salespersons, operating on commission, displayed sample footwear to prospective customers. *Id.*

[29] *Id.* at 316. *International Shoe*'s interpretation of "presence" to mean "contacts" caused many states to adopt "long-arm" statutes. These statutes defined certain types of events or transactions as contacts and allowed the state to serve process on a person falling within the statute wherever that person might have been. *See* F. JAMES & G. HAZARD, *supra* note 16, § 12.14, at 632. California adopted a long-arm statute that simply provided that the state's jurisdiction reached as far as the United States Constitution would allow. CAL. CIV. PROC. CODE § 410.10 (West 1973). Most statutes specify the necessary minimum contacts and require, for instance, the transaction of any business within the state, the commission of a tortious act, or the ownership, use, or possession of any real estate. *See* F. JAMES & G. HAZARD, *supra* note 16, § 12.14, at 632. Under Mississippi law, a nonresident defendant has the necessary minimum contacts if he has made a contract with a state resident, committed a tort within the state, or transacted any business within the state. MISS. CODE ANN. § 13-3-57 (Supp. 1982). *See generally* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction In Illinois*, 1963 U. ILL. L.F. 533, 537 (1963) (business transactions of nonresidents within a state sufficient to invoke long-arm statute); Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9, 12-15 (1969) (federal court use of state long-arm statutes in diversity actions necessary and proper to avoid federal nonconformity problems resulting from *Erie* doctrine).

[30] 326 U.S. at 316-17.

[31] *Id.* at 316.

substantial that personal jurisdiction could be asserted over an entity even though the cause of action arose from a transaction unrelated to its continuous activities within the state. Conversely, even a defendant's isolated contact within a state, if of sufficient nature and quality, could give rise to in personam jurisdiction.[32] The fourteenth amendment due process clause requires courts to balance the quality and nature of the contacts against the fair and orderly administration of the laws of the states.[33] The resulting inconvenience of forcing a nonresident corporation to defend away from its home or principal place of business was relevant to the consideration of fairness.[34] In applying the balancing approach in *International Shoe*, the Court found that the defendant had carried on systematic and continuous activities in the State of Washington. The defendant benefited greatly from these activities by receiving the protection of Washington law, which included the right to sue in state court. Finally, in addition to the necessary minimum contacts, the obligation sued upon arose in the forum state.[35] Thus, the defendant corporation's contacts with the state were such that the balancing approach favored the state's assertion of jurisdiction.[36]

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[32] *Id.* at 318.

[33] *Id.* at 319. *International Shoe* has been construed to require a determination of jurisdiction on the basis of various interests. Commentators have suggested that this requirement has caused difficulty in determining which factors are necessary for in personam jurisdiction. *See Developments In the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960) (interpretation of the balancing approach used in *International Shoe*). Other commentators have criticized the use of a balancing test to determine the extent of state court jurisdiction, arguing that most of the factors balanced, specifically convenience, have no constitutional relevance. *See* Comment, *Constitutional Limitation on State Long-Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 160-61 (1982).

[34] 326 U.S. at 317.

[35] *Id.*

[36] *Id.* at 320. The minimum contacts approach was extended to in rem actions in Shaffer v. Heitner, 433 U.S. 186 (1977). In *Shaffer*, a nonresident stockholder filed a shareholder's derivative action in Delaware against a group of nonresident defendants on a cause of action arising outside the state. *Id.* at 189-90. Although the property in question, approximately 82,000 shares of Greyhound common stock, was not within the actual physical boundaries of the state, the plaintiff attempted to "seize" it under a state law making Delaware the situs of ownership of all stock in Delaware corporations. *Id.* at 191-92. The defendants had no other connection with the state. *Id.* at 190. The *Shaffer* Court extended the same minimum contacts requirement set forth in *International Shoe* to all assertions of state court jurisdiction, including in rem jurisdiction. *Id.* at 206. The Court held that before any nonresident defendant could be legitimately brought before a state court on any cause of action, he had to have minimum contacts with that state. *Id.* at 212. *Shaffer*, therefore, established a new dimension in jurisdictional theory by merging in personam and in rem jurisdiction through use of the minimum contacts test. *See*

The Supreme Court liberally construed the minimum contacts doctrine in *Perkins v. Benguet Consolidated Mining Co.*,[37] in which a nonresident stockholder initiated a suit in an Ohio state court against the company, Benguet, on a cause of action that arose outside Ohio.[38] While in Ohio, the president of Benguet, who conducted a systematic, but limited operation of the company's Phillippine-based facilities from his home in Ohio,[39] was personally served with process.[40] The *Perkins* Court found that the corporation was doing business in Ohio and that its activities were sufficient to subject it to in personam proceedings in that state.[41] The *Perkins* Court, however, held that a state is not required to assume jurisdiction over a case simply because the due process clause is not violated.[42] Rather, a state may use its discretion in deciding the extent of its in personam jurisdiction if that decision does not create an unconstitutional exercise of power.[43] Commentators[44] and courts[45] have interpreted *Perkins* as authorizing a state to

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McDougall, *supra* note 14, at 5 & n.34.

[37] 342 U.S. 437 (1952).

[38] *Id.* at 438.

[39] *Id.* at 438-39. The defendant corporation was forced to abandon the facilities on the island as a result of the Japanese invasion of the Phillippines during World War II. *Id.*

[40] *Id.*

[41] *Id.* at 448. Two commentators have argued that the "*Perkins* case should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction." Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966). Another argument against a widespread application of *Perkins* was that "[t]he unavailability of an alternative forum weakens the authority of *Perkins* as support for the general proposition that so long as a corporation is carrying on substantial activities within the state it may be sued on an unrelated cause of action." *Developments in the Law, supra* note 30, at 932.

[42] 342 U.S. at 448.

[43] *Id.* at 440. Once jurisdiction has been conferred, however, it has long been decided that courts may not decline to exercise that jurisdiction. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976) (federal courts have a "virtually unflagging obligation" to exercise jurisdiction given them). *But see* 4 U. CHI. L. REV. 373, 375 (1980) (admiralty jurisdiction and doctrine of forum non conveniens provide exceptions to general rule of *Cohen*).

[44] *See, e.g.*, 7 ARK. L. REV. 403, 403 (1953) (*Perkins* permits state courts to exercise discretion based on state law and circumstances of case); 50 MICH. L. REV. 1381, 1383 (1952) (*Perkins* allows state courts wide discretion in taking jurisdiction over a foreign corporation with minimum contacts); 32 NEB. L. REV. 498, 500 (1953); 26 TEMP. L.Q. 199, 202 (1952).

[45] *See, e.g.*, Casas v. Royal Bank of Canada, 625 F.2d 139, 141 (7th Cir. 1980) (assuming that due process is met, decision whether to decline jurisdiction under *Perkins* remains with legislature and courts of forum state); Luckett v. Bethlehem Steel Corp.,

define the extent of its jurisdiction; however, once a state had made that initial determination, *Perkins* did not permit courts to refuse to hear a case falling within the limits that the state had set.[46]

In *S & W Construction Co. v. Douglas*,[47] the Mississippi Supreme Court specifically dealt with a situation in which a nonresident plaintiff sued a nonresident defendant on a cause of action that occurred outside Mississippi. Jurisdiction was properly exercised because the defendant was registered to do business in the state.[48] Another Mississippi jurisdictional issue was resolved by the United States Court of Appeals for the Fifth Circuit fifteen years later in *Steele v. G.D. Searle & Co.*[49] In *Steele*, the Fifth Circuit reversed a Mississippi district court's dismissal of a suit for lack of personal jurisdiction over a foreign corporate defendant who had been sued by a nonresident plaintiff on a cause of action that arose in Kansas.[50] Although not registered to do business within the state, the defendant regularly dealt with companies incorporated or licensed to do business in Mississippi[51] and had expected and received the protection of Mississippi law during these transactions.[52] In addition, the defendant maintained employees in the state and shipped several hundred thousand dollars worth of goods into the state each year.[53] Based on these contacts the court concluded

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618 F.2d 1373, 1385 (10th Cir. 1980); Margoles v. Johns, 483 F.2d 1212, 1220 (D.C. Cir. 1973); Beautytuft, Inc. v. Factory Ins. Assoc., 431 F.2d 1122, 1126 (6th Cir. 1970); Beaty v. M.S. Steel Co., 401 F.2d 157, 161 (4th Cir. 1968); Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., 310 F.2d 20, 23 (1st Cir. 1962) (*Perkins* does not require states to take all potential jurisdiction); Ark-La Feed & Fertilizer Co. v. Marco Chem. Co., 292 F.2d 197, 201 (8th Cir. 1961) (*Perkins* reserved ultimate question of jurisdiction for courts of that state).

[46] *See* 32 B.U.L. Rev. 338, 339 (1952) (extent of jurisdiction chosen by legislature, not courts); 32 Neb. L. Rev. 498, 500 (1953) (same).

[47] 244 Miss. 498, 142 So. 2d 33 (1962). The plaintiff was a resident of Tennessee, and the defendant was incorporated and had its principal place of business in Tennessee. *Id.* at 506, 142 So. 2d at 34. The plaintiff sought recovery for damages allegedly caused by the defendant's negligent construction work on a Tennessee highway. *Id.* at 504, 142 So. 2d at 33.

[48] *Id.* at 506, 142 So. 2d at 34.

[49] 483 F.2d 339 (5th Cir. 1973).

[50] *Id.* at 341. The defendant was a drug company incorporated in Delaware with its principal place of business in Illinois. Although the defendant owned no property in Mississippi, it did have three full-time employees in the state to solicit orders. *Id.* The plaintiff, a resident of Kansas, claimed that she suffered a serious and debilitating stroke in Kansas as a result of taking the defendant's inadequately tested birth control pills. *Id.* at 340-41.

[51] *Id.* at 349.

[52] *Id.*

[53] *Id.*

that the defendant could fairly be expected to defend this suit in Mississippi.[54] The court concluded that modern transportation had effectively negated distance as a legitimate argument against defending a suit in a remote forum; thus, corporations had to be prepared to litigate in areas affected by their commercial activities.[55]

Since *International Shoe*, the Supreme Court has attempted to delineate the scope of in personam jurisdiction in numerous cases,[56]

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[54] *Id.*; *see also* Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432, 434 (5th Cir. 1980) (exercise of jurisdicion proper when defendant did business of "a systematic and ongoing nature" in the state), *cert. denied*, 450 U.S. 917 (1981); Washington v. Norton Mfg., 588 F.2d 441, 444 (5th Cir.) (Mississippi long-arm cannot be invoked by a nonresident merely doing business in Mississipi), *cert. denied*, 442 U.S. 942 (1979).

[55] 483 F.2d at 349.

[56] In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), a resident plaintiff sued a nonresident defendant corporation in state court over a failure to pay certain insurance proceeds. The defendant had no office or agent within the state and had never solicited or done business in the state except for the issuance of the one policy. *Id.* at 221-22. The United States Supreme Court held that this single transaction was sufficient to assert jurisdiction over a nonresident defendant. *Id.* at 223. The state court had based its jurisdiction on a state statute that subjected foreign corporations to suit in California on causes of action concerning insurance contracts with residents of that state even though the corporations could not be served with process within the borders of the state. *Id.* at 221. The Supreme Court, in affirming jurisdiction, concluded that there was no due process violation because the suit was based on a contract that was substantially connected with the forum state. *Id.* at 223.

One year later the Supreme Court decided Hanson v. Denckla, 357 U.S. 235 (1958), in which a foreign corporation was sued in a Florida state court on a cause of action that arose outside the state. The defendant corporation neither maintained an office in the state nor transacted any business in Florida. In addition, the corporation had never solicited any business in the state, nor were the assets that were the subject of the suit present within the state. The Supreme Court ruled that this lack of minimum contacts with the forum state precluded an in personam action against the corporation. *Id.* at 251.

In 1978, the Court decided Kulko v. California Superior Court, 436 U.S. 84 (1978), which dealt with child support payments that were being made by the father, a resident of New York, to the mother, a resident of California. *Id.* at 87. The father had been awarded custody of the children for nine months of every year, but both children eventually began to live full-time with their mother. *Id.* at 88. The mother sued for increased child support in the state court on the basis that the father had caused an effect within the state. *Id.* at 88-89. The state court concluded that the exercise of in personam jurisdiction is reasonable when a defendant has personally availed himself of the benefits and laws of the state. *Id.* at 89. The Supreme Court, however, reversed the state court's action as an unwarranted extension of *International Shoe* and stated that forcing the father to defend the suit in California was not "fair, just, or reasonable." *Id.* at 92. The Court concluded that because the father lacked any personal or commercial benefit from his children's presence in the state, and also lacked any other relevant contacts, the state's assertion of jurisdiction over him was a clear violation of the due process clause. *Id.* at 100-01. *See generally* McDougall, *supra* note 17, at 30 (defendant must purpose-

the most significant being *World-Wide Volkswagen Corp. v. Woodson.*[57] In *World-Wide,* an Oklahoma state court exercised in personam jurisdiction over a nonresident automobile retailer.[58] An accident involving one of its cars was the defendant's only connection with the state.[59] Because this incident did not constitute even the most basic minimum contact,[60] the *World-Wide* Court held that requiring the retailer to defend the suit in Oklahoma solely on the basis of one automobile accident violated the due process clause.[61]

The Court in *World-Wide* explained that the concept of minimum contacts protects a defendant from litigating in an inconvenient forum and ensures that states do not overreach the limits placed on them as co-equal sovereigns in a federal system.[62] One commentator has noted that although the Supreme Court sharply limited the range of potential considerations by placing the minimum contacts approach above the traditional balancing method of *International Shoe,* the outcome should be substantially the same because a jurisdiction lacking minimum contacts with the defendant is unlikely to be designated a fair forum under a balancing process.[63]

In the instant case, the court reasoned that all foreign corporations doing business in Mississippi were subject to suit in the state to the same extent as domestic corporations, regardless of where the cause of action occurred.[64] Mississippi has a policy of treating foreign and domestic corporations equally,[65] and because the state supreme court had

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fully avail himself of the benefits and protections of the forum state's laws before jurisdiction is proper); Comment, *supra* note 33, at 157-58 (defendant's activities must be in-state effects before use of long-arm statute is proper); 51 MISS. L.J. 121, 128-29 (1980) (current trend of minimum contacts test limits, not expands, jurisdiction of state courts); Note, *supra* note 16, at 87 (minimum contacts tests affords states wide discretion for exercising jurisdiction).

[57] 444 U.S. 286 (1980). *World-Wide* was a products liability suit based upon the alleged defective design and placement of a fuel tank in an automobile. *Id.* at 287.

[58] *Id.* The defendant was a New York corporation. *Id.*

[59] *Id.* The accident occurred in Oklahoma after the defendant had sold the automobile in New York to New York residents. *Id.*

[60] *Id.* at 295.

[61] *Id.*

[62] *Id.* at 291-92.

[63] *See* Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal,* 59 N.C.L. REV. 429, 459 (1981).

[64] 694 F.2d at 105; *see supra* note 8 and accompanying text.

[65] 694 F.2d at 105. The conclusion that Mississippi law has treated foreign and domestic corporations equally was based on the Mississippi Supreme Court's opinion in Poole v. Mississippi Publishers Corp., 208 Miss. 364, 379-80, 44 So. 2d 467, 473 (1950). In *Poole,* a foreign corporation was allowed to seek an injunction in a Mississippi chancery

previously ruled that Mississippi trial courts had jurisdiction over a nonresident plaintiff's suit against a foreign corporation on a cause of action that arose outside the state,[66] the exercise of jurisdiction over Ford was valid.[67] The court further noted that the United States Supreme Court had permitted a state court to exercise jurisdiction over a defendant only minimally connected with the state,[68] and that Ford had already come into Mississippi, voluntarily subjecting itself to Mississippi process.[69] In addition, because Ford had agreed to be treated as a resident corporation,[70] and because Ford, by appointing a resident agent and by doing substantial business within the state, had consented to the imposition of personal jurisdiction by Mississippi,[71] the court found that the assertion of in personam jurisdiction in the instant case was not violative of the due process clause.[72]

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court. *Id.* at 370, 44 So. 2d at 469. The court, after an analysis of previous case law, stated that Mississippi has had a general policy of equality and similarity of treatment between foreign and domestic corporations. *Id.* at 380, 44 So. 2d at 473. This policy was followed in Leavell v. Doster, 211 So. 2d 812 (Miss. 1968), in which a foreign corporation registered to do business within the state was allowed to use the Mississippi long-arm statute, although a corporation not registered to do business would not have been. *Id.* at 814.

[66] 694 F.2d at 106. The Fifth Circuit relied primarily on S & W Constr. Co. v. Douglas, 244 Miss. at 506, 142 So. 2d at 34, for the Mississippi Supreme Court's affirmation of jurisdiction over a nonresident defendant on a cause of action that occurred outside the state. 694 F.2d at 106. *See supra* notes 47-48 and accompanying text.

[67] 694 F.2d at 106.

[68] *Id; see supra* notes 37-46 and accompanying text.

[69] 694 F.2d at 107; *see supra* note 8 and accompanying text.

[70] 694 F.2d at 107.

[71] *Id.*

[72] *Id.* Ford argued that to satisfy the due process clause the forum state must have an interest in the outcome of the suit. The court found, however, that the cases cited for that proposition referred only to the use of long-arm statutes and thus were inapplicable. The court also noted that no such analysis was necessary and that Mississippi courts clearly had jurisdiction over the case because Ford was doing business in Mississippi and had voluntarily subjected itself to service of process. The court recognized that Mississippi did have an interest in the suit because of its policy of treating authorized foreign corporations and domestic corporations equally. Ford argued that its right to due process was violated by the application of the Mississippi, rather than Texas, statute of limitations period. The Fifth Circuit, ruled that because the issue was not one involving substantive law, the due process clause was not violated by the use of the more liberal Mississippi limitations statute.

The defendant's final argument was that the use of the more liberal Mississippi statute of limitations on another state's claim would infringe upon the sovereignty of the other state. In response, the Fifth Circuit concluded that because limitation statutes were designed only to close the doors of a state's courts to untimely claims, that purpose was not subverted by the use of the Mississippi statute of limitations in its own courts.

Since 1874[73] Mississippi courts have allowed a nonresident plaintiff to sue a nonresident defendant over a cause of action that arose outside the state.[74] This policy is constitutionally permissible under the United States Supreme Court's decisions in *International Shoe*[75] and *Perkins*[76] as long as the minimum contacts requirement of *International Shoe* is met in the particular case.[77] Recent Fifth Circuit decisions interpreting the jurisdiction of federal courts in Mississippi over nonresident defendants support this view.[78] Because the Mississippi law on this jurisdictional issue is well-settled and the federal requirement of minimum contacts was met, a state court could have constitutionally exercised jurisdiction in *Cowan*.

The exercise of jurisdiction by a federal district court was not made discretionary by *Perkins* because that case only referred to the original decision by a state concerning the extent of its jurisdictional statute and did not overrule or distinguish earlier cases holding that a trial court lacked discretion to decline to hear a case if jurisdiction was proper.[79] Because a federal court hearing a state claim must exercise jurisdiction if a state court should,[80] then clearly the district court was obligated to hear *Cowan*. Therefore, the decision reached by the Fifth Circuit in *Cowan* does not significantly extend traditional due process rules, but merely reaffirms long-established Mississippi case law and statutes in light of *International Shoe*.

This reaffirmation, however, is not without potential drawbacks. Because Mississippi's statute of limitations for wrongful death actions is longer than those of its sister states,[81] *Cowan* may transform Mississippi's overcrowded federal courts into a dumping ground for otherwise stale claims against multistate corporations.

This conclusion was reinforced by the court's realization that the imposition of the Texas limitations statute upon a Mississippi court would infringe upon the sovereignty of Mississippi. *Id.*

[73] *See supra* note 21.

[74] *See supra* notes 18-26, 47-48, and accompanying text.

[75] *See supra* notes 27-36 and accompanying text.

[76] *See supra* notes 37-46 and accompanying text.

[77] *See supra* notes 29-31 and accompanying text.

[78] *See supra* notes 49-55 and accompanying text.

[79] *See supra* note 43 and accompanying text.

[80] Steele v. G.D. Searle & Co., 483 F.2d 339, 342 (5th Cir. 1973).

[81] *Compare* MISS. CODE ANN. § 15-1-49 (1972) (6-year statute of limitations for wrongful death actions) *with* ALA. CODE § 6-2-39 (1975) (1 year) *and* ARK. STAT. ANN. § 27-907 (1947) (3 years) *and* FLA. STAT. ANN. § 95.11 (West 1982) (2 years) *and* GA. CODE ANN. § 9-3-33 (1982) (2 years) *and* LA. CIV. CODE ANN. art. 3536 (West 1953) (1 year) *and* TENN. CODE ANN. § 28-3-104 (1980) (1 year).

Another major drawback involves application of the territorial provision of Mississippi's commercial code, which requires use of Mississippi law on disclaimers of liability for the implied warranties of merchantability and fitness for a particular purpose.[82] Mississippi prohibits the use of disclaimers for any implied warranty,[83] thus invalidating any disclaimer provision in a contract being litigated in Mississippi. This is particularly significant since most neighboring states allow the use of disclaimer provisions.[84] Consequently, Mississippi law could nullify a disclaimer validly made in another state if the party seeking enforcement of an implied warranty brings the case in Mississippi. This possibility, coupled with Mississippi's lengthy statute of limitations, and a nonresident's power to sue a corporation found doing business in the state under *Cowan,* could result in a large number of out-of-state plaintiffs bringing suit in Mississippi under *Cowan* solely for the purpose of invalidating out-of-state disclaimers. The problems presented by *Cowan* are thus more than sufficient to warrant the Mississippi Legislature to seriously consider bringing Mississippi's current six-year statute of limitations in line with its sister states to avoid a possible forum shopping problem under *Cowan.*

Patrick McMurtray

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[82] *See* MISS. CODE ANN. § 75-1-105(1) (1981).

[83] *Id.* § 81-7-18 (Supp. 1982).

[84] *See, e.g.,* ALA. CODE § 7-2-316 (1975); ARK. STAT. ANN. § 85-2-316 (1966 & Supp. 1981); FLA. STAT. ANN. §§ 672.2-316, 672.2-719 (West 1966 & Supp. 1983); GA. CODE ANN. §§ 11-2-316, 11-2-719 (1982); TENN. CODE ANN. §§ 47-2-316, 47-2-719 (1979); TEX. BUS. & COM. CODE ANN. §§ 2.316, 2.719 (Vernon 1968 & Supp. 1982).

BOOK REVIEW

AGRICULTURAL LAW

By: Julian C. Juergensmeyer
and James B. Wadley
Boston, Massachusetts: Little, Brown and Company, 1982
2 Vols., Pp. 1118 $140.00

*Larry S. Bush**

Over four thousand years ago the Code of Hammurabi contained detailed laws governing land use and farming operations.[1] From that time to the present the law has consistently regulated agriculture to a greater or lesser extent. Curiously enough, the recognition of "agricultural law" as a discrete area of legal specialization is a fairly recent phenomenon. Indeed, although interest in agricultural law has been growing for several decades, only within the past three years has it attracted the attention of treatise writers. Juergensmeyer and Wadley's *Agricultural Law* is the most recent of three multi-volume works published on this topic since 1980.[2]

Why the increased interest? I suspect it is in large part because agriculture has become, in every sense of the term, big business. As corporations have inexorably begun to replace the

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[1] Uchtmann, *Agricultural Law: Past, Present and Future*, 4 AGRI. L.J. 443-44 (1983). This ancient Babylonian code included at least one rule that modern farmers would readily accept: veterinarians were to be paid only if the treated animal recovered; if it died, the owner was to be paid one-fourth its value. *Id.*

[2] The other two treatises are J. DAVIDSON, AGRICULTURAL LAW (1981) (2 volumes) and N. HARL, AGRICULTURAL LAW (1980) (15 volumes). In addition, one specialized law review, the AGRICULTURAL LAW JOURNAL, recently renamed the JOURNAL OF AGRICULTURAL TAXATION AND LAW, has appeared during this period.

sole proprietorship family farm,[3] and as international trade has become an increasingly important factor, the demands of agribusiness for competent legal advice have doubtless grown. Moreover, agricultural law[4] is becoming more complicated. For some time farmers have been faced with government regulations and programs governing such areas as price supports, marketing orders, and the availability of credit. During the past decade farmers have also had to confront federal legislation subjecting agriculture to minimum wage, occupational safety and health, and environmental pollution standards. Several states have gone even further, enacting comprehensive agricultural labor relations laws.[5] Finally, controversial legal and political issues have been arising regularly, such as farm financial distress, foreign ownership of farm land, and environmental-land use restrictions.

Juergensmeyer and Wadley's treatise is an attempt to address the major legal issues and institutions affecting agriculture in the 1980's. Volume I combines treatment of rapidly-developing areas of law and policy, such as foreign ownership of farmland and preservation of agricultural lands with basic coverage of federal agricultural regulation. Volume II surveys civil liability for agricultural operations, as well as the effect of commercial, tax, bankruptcy, and estate law on agriculture. The result is a solid, if somewhat uneven, introductory work that should prove valuable to general practitioners, farm-owners and operators, and members of the agribusiness community generally. It does not purport to be an exhaustive research tool, nor could it

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[3] Sole proprietorships and partnerships still dominate agriculture. The authors note that between 1957 and 1974, the total number of such agricultural entities declined by 191,000, and corporations increased from 8,200 to 27,300; the share of corporate receipts as a percentage of total farm business receipts rose from 6.8% to 20.6%. 2 J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW § 30.1, at 128-29 (tables 30-1, 30-2) (1982).

[4] Juergensmeyer and Wadley define "agricultural law" broadly:

> The vast body of statutes, regulations, rules, administrative decisions, judicial decisions, and common law principles that apply to agricultural operations and activities. The concept of "agricultural operations and activities" must be defined equally broadly to include the production of food, fiber, and certain fuels, and the related activities of those who participate in the production, processing, storage, or marketing of agricultural commodities.

1 JUERGENSMEYER & WADLEY, *supra* note 3, § 1.1, at 3.

[5] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-1381 to -1395 (1980); CAL. LABOR CODE §§ 1140-1166 (West 1970).

be, in two volumes. For the most part, citations to existing case law are severely curtailed, with references limited to leading cases, pertinent statutes, and regulations. Many chapters include generous citations to contemporary literature—books, journal articles, and government publications.

In my view, the functional core of *Agricultural Law* lies in two of its five major parts: Part III, Federal Agricultural Legislation and Regulations, and Part V, Agribusiness Law. The first two chapters of Part III set out the basic nature and structure of the federal agencies, especially those within the Department of Agriculture, whose activities directly affect agricultural operations. These chapters are followed by others explaining the basic workings of the major substantive federal farm-related programs—price supports, marketing agreements and orders, farm credit, crop insurance, the Packers and Stockyards Act, the Perishable Agricultural Commodities Act, plant patents, and the Federal Seed Act. Subsequent chapters survey the extent to which Federal labor law (primarily the Fair Labor Standards Act and the Farm Labor Contractor Registration Act), safety statutes (Occupational Safety and Health Act), and pollution control statutes (the Clean Air Act and the Federal Water Pollution Control Act)[6] must be taken into account in agricultural operations.

The depth of treatment given in this part will probably not satisfy attorneys who regularly represent agricultural clients before these agencies. For such readers there will be little new on these pages. Rather, what is presented is a general frame of reference and a point of beginning for lawyers and laypersons to whom this may be somewhat alien territory. Indeed, if this is viewed as a reference work, the primary shortcomings at this point are the occasional long stretches of explanatory text unsupported by helpful documentation for the uninitiated.[7]

Part V, Agribusiness Law, begins with a presentation of the advantages and disadvantages associated with the various types

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[6] Federal regulation of pesticides is discussed in connection with tort liability for farm chemicals.

[7] See, for example, §§ 9.5.2 to 9.9, which deal with price support programs, the role of the Commodity Credit Corporation, and the Agricultural Stabilization and Conservation Service.

of business entities into which a farming enterprise may be organized: corporations, sole proprietorships, partnerships, and cooperatives. Here, the advice is pointed, as the authors address the problem-solving needs of readers faced with clients, creditors, and taxmen. Laudably, this perspective is maintained through the balance of Volume II, in chapters covering the Uniform Commercial Code, federal income taxation, bankruptcy, and federal tax aspects of estate planning.

It is not possible, even in two volumes, to assay state regulation of agriculture, one of the most significant aspects of this field of law. For the most part, the authors do not try.[8] Actually, the only sustained foray into state law comes, understandably enough, in the five chapters on tort liability. Elsewhere, with rare exceptions, the emphasis remains on either federal law or on uniform state law.

A collection of less easily categorized chapters make up the balance of the text. Their quality varies with the subject. For instance, Chapter 4, Protection and Preservation of Agricultural Lands, is a well-written, stimulating analysis of land use control devices developed or proposed to shield farmers and their real property from the pressures of urbanization.[9] In contrast, the two preceding chapters (Government Regulation of Agriculture and Regulation) offer a fairly superficial introduction to general administrative law principles,[10] much of which could have been incorporated elsewhere more effectively.

A package of fifty-six sample forms has been assembled at the end of Volume II. Most are standard Federal agency documents, but other forms, chiefly leases and easements, are also reproduced. They are arranged in a sequence roughly paralleling the subject matter of the text, but they would have been even

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[8] By way of example, the index to the Mississippi Code contains 26 pages of references to statutes related to agricultural subjects. None are cited in AGRICULTURAL LAW.

[9] Professor Juergensmeyer has been active on this subject for some time. *See, e.g.*, Juergensmeyer, *State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463 (1980); Wershow & Juergensmeyer, *Agriculture and Changing Legal Concepts in an Urbanized Society*, 27 U. FLA. L. REV. 78 (1974).

[10] The discussion of judicial review in chapter 3 includes the traditional notions of standing, ripeness, and scope of review, but omits entirely any mention of implied private rights of action. *See* Court v. Ash, 422 U.S. 66, 78 (1975) (establishing test for implying private right of action under federal statute).

more useable if systematic cross-referencing had been provided.

The authors have synthesized a great deal of material from many sources to compile a useful handbook for the agricultural community and the expanding bar that services it. On the whole, they have succeeded in writing a straightforward, easily understood treatise. In the final analysis that is probably the single most important consideration for its intended audience.

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